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Subcommittee on Workforce Protections

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## ***SECOND CLASS WORKERS: ASSESSING H2 VISA PROGRAMS IMPACT ON WORKERS***

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### Introduction

Thank you to Subcommittee Chair Rep. Adams, as well as Committee Chair Rep. Scott, Ranking Members, and the other distinguished members of the Subcommittee for allowing me to testify at this hearing on the H-2 temporary visa programs and how to better protect workers. I am a researcher at the Economic Policy Institute, a nonprofit, nonpartisan think tank dedicated to advancing policies that ensure a more broadly shared prosperity, and that conducts research and analysis on the economic status of working America and proposes policies that protect and improve the economic conditions of low- and middle-income workers—regardless of their immigration status—and assesses policies with respect to how well they further those goals.

I am especially honored to be before the Subcommittee on Workforce Protections because I am myself the son of two immigrants, each of whom came from a different country and through different immigration pathways, and who met each other in the great melting pot that is my home state of California. My parents I are the direct beneficiaries of the American immigration system—but I also believe that the United States has benefitted greatly from immigration and the immigrants who arrive—both economically and culturally—which is why there is no question in my mind that immigration is good for the United States. It's also why I believe that the United States should grow and expand pathways for immigrants to come and stay and integrate into the United States, and believe we should do much more to improve the migration pathways that currently exist.

The purpose of this hearing is to discuss two of the most well-known and important work visa programs in the United States, the H-2A visa program—for temporary and seasonal jobs in agriculture—and the H-2B program—for temporary and seasonal jobs outside of agriculture. This hearing is timely and of utmost importance because in recent years, the size of both

programs has increased rapidly—but during those years—few, if any, new protections have been implemented to ensure that workers in those programs are adequately protected from abuses like wage theft and trafficking. Congress and federal agencies have failed to implement those measures despite numerous and egregious cases of worker abuse, exploitation, human trafficking, and even deaths.

In the broadest terms, I wish to note at the outset that U.S. workers should have certain rights vis-à-vis the U.S. temporary work visa programs. First, they should have the right to have a fair and first shot at job openings in the United States. Second, U.S. workers should have the right to be protected from competition with workers who are paid artificially low wages that are the result of corporate exploitation of the immigration system. And migrant workers who are recruited to the United States to fill job openings should also have certain rights. They should have the right to be free from paying fees to the recruiters who connect them to jobs in the United States. They should have the right to leave an abusive or law-breaking employer without fearing retaliation and deportation. And they should have the right to be paid no less than the local average wage for the jobs they fill, according to U.S. wage standards. And importantly—because of the exploitative nature of temporary work visa programs—migrant workers should have an opportunity to stay permanently and continue to contribute to the United States, by having access to a quick path to permanent residence and citizenship—and it should be a path that the migrant controls, not one that is controlled by employers.

Unfortunately, when it comes to the H-2A and H-2B visa programs, the U.S. government is failing to meet these basic standards and provide these basic rights to U.S. workers and migrant workers in the H-2A and H-2B visa programs.

My testimony will discuss the flaws that are common across U.S. temporary work visa programs and offer common sense solutions, and present the available data about the H-2A and H-2B visa programs in terms of their size and workplace abuses and wage theft. It will also suggest executive and congressional reforms that should be implemented. Because other witnesses in this hearing will discuss the H-2A program in depth, the recommendations specific to H-2 in my testimony will focus mainly on the H-2B program.

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## U.S. temporary work visa programs

Nearly all immigrants, refugees, and asylum-seekers join the workforce after entering the United States, but a portion of our immigration system is intended to bring people here expressly for work. Within that complex employment-based system, the majority of migrants come through temporary, precarious pathways—known as temporary work visa programs—that provide employers with millions of on-demand workers who have limited rights, and whose needs and realities are not well understood, even by mainstream immigration advocates.

While temporary work visa programs represent a major component of the U.S. immigration system, less is known about them compared with other aspects of the system that garner more public attention. Nonetheless, work visa programs have played an outsized role in political and policy debates about how to reform the immigration system in the past, and likely will again.

Temporary work visa programs are an instrument ultimately used to deliver migrant workers to employers, but without having to afford them equal rights, dignity, or the opportunity to integrate and participate in political life. While such programs may serve as important pathways for migrants to come to the United States, the numerous programmatic flaws that undermine labor standards and leave migrant workers vulnerable to abuses—and even human trafficking—clearly demonstrate a need for dramatic improvements.

This is not news; migrant worker advocates, government auditors, and the media have identified these flaws across U.S. temporary work visa programs for decades. Most of the workers who participate in the programs will never have a chance to become lawful permanent residents or naturalized citizens, despite spending months, and in many cases, years, working in the United States. The COVID-19 pandemic and the national emergency that was declared on March 13, 2020,<sup>1</sup> along with the inadequacy of the federal government’s response, have only exacerbated the challenges migrant workers face while employed through temporary work visa programs, many of which continue today.

Despite the popular narrative that former President Trump’s administration instituted a so-called immigration crackdown on all pathways into the United States, temporary work visa programs were a clear exception. Even before the pandemic began, important immigration pathways that can lead to permanent residence and citizenship had been slashed by the Trump administration—and humanitarian pathways for asylees and refugees in particular had already been reduced to historic lows. But, at the same time, data show that temporary work visa programs were 13% larger in 2019 than during the last year of the Obama administration. Even the Trump administration’s temporary work visa “ban” issued in June 2020 in retrospect looks to have been mostly symbolic—a political tactic to blame migrants for high unemployment and the economic collapse that resulted from the COVID-19 pandemic. This point in history was a dangerous trajectory away from welcoming immigrants as persons

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<sup>1</sup> Donald J. Trump, “[Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease \(COVID-19\) Outbreak](#),” (presidential proclamation), March 13, 2020.

who have equal rights and who can settle in the United States permanently and toward using the immigration system mostly to appease the desire employers have for more indentured and disposable migrant workers. Today, the Biden administration is still attempting to reconstitute much of the immigration system that was torn down by the Trump administration. Numerous reports have shown that staffing shortages and backlogs have led to the wasting—in other words the non-issuance of—green cards that should have been issued to people who have been waiting for years to become permanent immigrants to the United States.

When it comes to U.S. labor migration pathways, they can and should be reformed to comport with universal human and labor rights standards. Many major improvements to temporary work visa programs can be accomplished by the executive branch through regulations, new guidance, and other executive actions, as my testimony will discuss. Nevertheless, the reality remains that some of the most transformative and lasting solutions will require congressional action, and those reforms will also be disused herein. An added benefit of these more durable solutions is that they will set a useful baseline of protections for temporary migrant workers, both in normal times and during emergencies like pandemics, and during both periods of high unemployment and tight labor markets.

Now is the moment for policymakers to take stock of the immigration system and implement needed reforms to employment-based migration pathways. And considering that a record number of temporary migrant workers are employed in the United States—more than 2 million, with many performing jobs that have now been deemed “essential”—the need to protect these workers has never been more acute.

### *The basics: What are temporary work visa programs?*

One of the main authorized or “legal” pathways for U.S. employers that wish to hire migrant workers or for migrants who want to work in the United States lawfully is via “nonimmigrant” visas that authorize temporary employment. In the United States, employers almost exclusively control and drive the process, by deciding to recruit and hire employees through temporary work visa programs. Workers who participate in those programs are known as temporary migrant workers, or “guestworkers”—defined as persons employed away from their home countries in temporary labor migration programs. The programs themselves are often referred to as circular or “guest” worker programs, or temporary work visa programs.<sup>2</sup> Temporary and home can be defined in different ways, with “temporary” ranging from several months to several years, and “home” usually meaning the worker’s country of birth or citizenship.<sup>3</sup> All temporary work visa programs require migrant workers to return to their home countries when their visa expires; workers can remain legally in the United States only if they obtain another temporary visa or lawful permanent resident status.

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<sup>2</sup> For the most part, these terms are interchangeable, and no one term is definitive or has been agreed to.

<sup>3</sup> See discussion of the average maximum allowed duration of stay of temporary visa holders across Organisation for Economic Co-operation and Development countries in Daniel Costa and Philip Martin, “[OECD Highlights Temporary Labor Migration: Almost as Many Guestworkers as Permanent Immigrants.](#)” *Working Economics* blog (Economic Policy Institute), Dec. 4, 2019.

The most common argument for using temporary work visa programs to facilitate migration is that they help employers fill vacant jobs, especially when employers assert there is a shortage of U.S. workers, in other words, to fill labor shortages. Other major rationales include (1) to facilitate youth exchange programs and admit foreign students (in both cases, the migrants are usually permitted to work); (2) to allow intracorporate transfers (sometimes called intracompany transfers), meaning that employees of multinational companies move from a branch or office of a company to another branch or office of the same company in a different country; (3) to fulfill trade agreement provisions, such as those included in agreements like the North American Free Trade Agreement; (4) to facilitate foreign investment in countries of destination; (5) to manage migration that would otherwise be inevitable—for example, as the result of geopolitical changes; and (6) to allow for cross-border commuting.<sup>4</sup>

According to the Congressional Research Service, “there are 24 major nonimmigrant visa categories, which are commonly referred to by the letter and numeral that denote their subsection in the Immigration and Nationality Act (INA)”<sup>5</sup>; over the past few years, between 9 million and 11 million total nonimmigrant visas have been issued. While the vast majority of these were visitor visas that do not authorize employment, nevertheless hundreds of thousands of new nonimmigrant visas in an alphabet soup of temporary work visa programs have been issued to migrant workers or renewed; in addition, the United States has approved work permits for nonimmigrants in visa classifications that do not automatically authorize employment.

Some work visa programs have an annual numerical limitation. For example, the H-2B visa is capped at 66,000 per year; the H-1B visa is capped at 85,000 for the private sector—although it also allows an unlimited number not subject to the annual cap for certain employers.<sup>6</sup> However, most work visa programs do not have an annual numerical limit. Each visa program has a different duration of stay associated with it, as well as individual rules about whether and how it can be renewed. For example, H-2A visas for temporary and seasonal agricultural occupations are valid for up to one year, depending on the duration of the job, but can sometimes be renewed, while H-1B visas for occupations that require a college degree may be valid for up to three years, renewable once for a total of six years, and L-1 visas for intracompany transferees may last up to five years for a position that requires specialized knowledge about the employer, or seven years if the worker is a manager or executive.

The Pew Research Center has estimated that approximately 5% of the total foreign-born population are temporarily residing in the United States with nonimmigrant visas.<sup>7</sup> Although good data are lacking from the U.S. government on the exact number of nonimmigrant residents who are employed, and in which visa programs, I have estimated that more than 2

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<sup>4</sup> Daniel Costa and Philip Martin, *Temporary Labor Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact for Migration*, Economic Policy Institute, Aug. 1, 2018.

<sup>5</sup> Jill H. Wilson, *Immigration: Nonimmigrant (Temporary) Admissions to the United States*, Congressional Research Service, updated Sept. 10, 2019.

<sup>6</sup> For example, cap-exempt H-1Bs are available if an employer is a university, a university-affiliated nonprofit entity, or a nonprofit research organization.

<sup>7</sup> Abby Budiman, “[Key Findings About U.S. Immigrants](#),” *Fact Tank* (Pew Research Center), Aug. 20, 2020.

million temporary migrant workers were employed in 2019, accounting for 1.2% of the U.S. labor force (see discussion in the following section).<sup>8</sup>

### *The numbers in context: Temporary work visa programs grew under Trump, while permanent pathways shrunk and have not yet been fully restored*

Despite the popular narrative that the former Trump administration instituted an “immigration crackdown” on all pathways into the United States, temporary work visa programs were a clear exception. Other, permanent immigration pathways that can lead to citizenship were slashed—even before the pandemic began—including the number of refugees admitted being reduced to a historic low and asylum being severely restricted<sup>9</sup>—but this has not been the case with temporary work visa programs.

The main factor impacting the issuance of both permanent and temporary visas since the COVID-19 pandemic has been the slowdown and shutdown of consular processing for visas around the world, along with staffing shortages at United States Citizenship and Immigration Services (USCIS), and the impact is still being felt today in mid-2022. In any case, the shift to more temporary work visas and fewer permanent immigrant visas during the Trump administration was a significant and dangerous trajectory away from welcoming immigrants who would be granted equal rights and the ability to settle in the United States permanently; it reflects an immigration system used mainly to appease the business community’s demands for more migrant workers who are indentured to them and disposable.<sup>10</sup>

**Table 1** below shows an estimate of the number of temporary migrant workers employed in 2016 and in 2019, the year before the disruptions to the immigration system caused by the pandemic, based on an updated version of the methodology devised by Costa and Rosenbaum.<sup>11</sup> It reveals that the number of temporary migrant workers employed during 2019 was nearly 2.1 million—over 237,000 more than during the last year of the Obama administration, or a 13% increase. In total these workers represented 1.2% of the U.S. labor market in 2019. Much of the increase was driven by growth in the visa programs for low-wage jobs—H-2A, H-2B, and J-1—but also by growth in a number of the visa programs for migrant

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<sup>8</sup> Previous estimates include Costa and Rosenbaum, who estimated that approximately 1.4 million temporary migrant workers were employed in the United States in 2013 through temporary work visa programs, accounting for roughly 1% of the labor force at the time, and the Organisation for Economic Co-operation and Development, which estimated in 2019 that there were 1.6 million full-time-equivalent jobs filled by migrants with temporary visas in 2017, also accounting for 1% of the labor force. Daniel Costa and Jennifer Rosenbaum, [Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification](#), Economic Policy Institute, March 7, 2017; Organisation for Economic Co-operation and Development, [International Migration Outlook 2019](#), Oct. 15, 2019.

<sup>9</sup> See more extensive discussion in Daniel Costa, [Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19](#), Economic Policy Institute, February 3, 2021.

<sup>10</sup> See more extensive discussion in Daniel Costa, [Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19](#), Economic Policy Institute, February 3, 2021.

<sup>11</sup> See Daniel Costa and Jennifer Rosenbaum, [Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification](#), Economic Policy Institute, March 7, 2017. The updated methodology includes visa classifications that authorize employment but were not included in the previous estimate and uses additional data sources for B-1, E-2, H-1B, and J-1 visas.



workers who normally possess at least a college degree, including H-1B visas (for information technology jobs), the Optional Practical Training program for foreign graduates with F-1 visas, L-1 visas for intracompany transferees, and O-1 and O-2 visas for persons with extraordinary abilities.

**Table 1.**

### Temporary work visa programs grew 13% under Trump

Estimated number of temporary migrant workers employed in the United States, 2016 and 2019

Nonimmigrant visa classification	Number of workers employed	
	2016	2019
<i>A-3 visa for attendants, servants, or personal employees of A-1 and A-2 visa holders</i>	2,162	1,687
<i>B-1 visa for temporary visitors for business</i>	3,000	3,000
<i>CW-1 visa for transitional workers on the Commonwealth of Northern Mariana Islands</i>	8,093	3,263
<i>F-1 visa for foreign students, Optional Practical Training program (OPT) and STEM OPT extensions</i>	199,031	223,308
<i>G-5 visa for attendants, servants, or personal employees of G-1 through G-4 visa holder</i>	1,309	945
<i>E-1 visa for treaty traders and their spouses and children</i>	8,085	6,668
<i>E-2 visa for treaty investors and their spouses and children</i>	66,738	66,738
<i>E-3 visa for Australian specialty occupation professionals</i>	15,628	16,858
<i>H-1B visa for specialty occupations</i>	528,993	583,420
<i>H-2A visa for seasonal agricultural occupations</i>	134,368	204,801
<i>H-2B visa for seasonal nonagricultural occupations</i>	149,491	160,410
<i>H-4 visa for spouses of certain H-1B workers</i>	54,936	74,749
<i>J-1 visa for Exchange Visitor Program participants/workers</i>	193,520	222,597
<i>J-2 visa for spouses of J-1 exchange visitors</i>	10,147	11,781
<i>L-1 visa for intracompany transferees</i>	316,224	337,164
<i>L-2 visa for spouses of intracompany transferees</i>	25,670	25,673
<i>O-1/O-2 visa for persons with extraordinary ability and their assistants</i>	38,706	47,725
<i>P-1 visa for internationally recognized athletes and members of entertainment groups</i>	24,262	25,601
<i>P-2 visa for artists or entertainers in a reciprocal exchange program</i>	97	107
<i>P-3 visa for artists or entertainers in a reciprocal exchange program</i>	8,426	9,848
<i>TN visa or status for Canadian and Mexican nationals in certain professional occupations under NAFTA</i>	50,000	50,000
<i>Total</i>	<i>1,838,886</i>	<i>2,076,343</i>

**Notes:** Methodology for calculating the number of workers derived from Daniel Costa and Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, Economic Policy Institute, March 2017. All references to a particular year should be understood to mean the U.S. government's fiscal year (Oct. 1–Sept. 30).

**Sources**

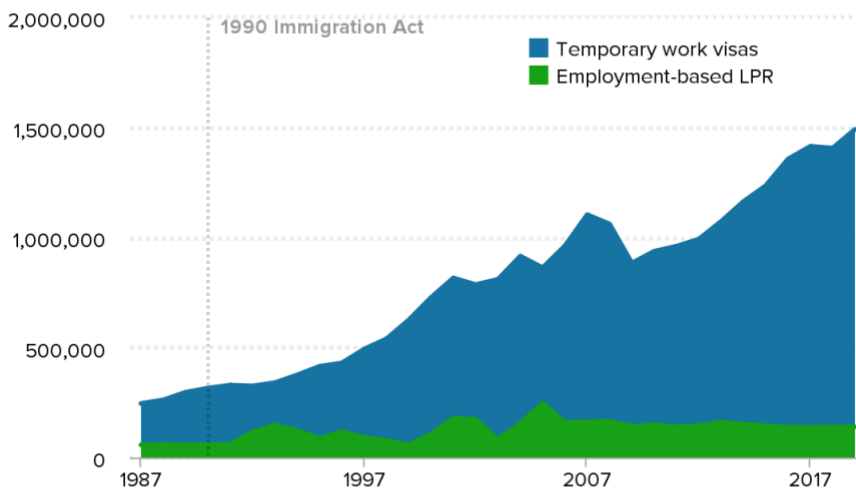
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## Growth in temporary work visa programs is part of a long-term trend

While temporary work visa programs expanded during the Trump administration, the growth of the programs represented a continuing long-term trend dating back more than 30 years. **Figure A** shows the number of new visas issued in 36 nonimmigrant visa classifications that represent U.S. temporary work visa programs, or programs that allow spouses and children to accompany the principal temporary migrant worker, between 1987 and 2019.<sup>12</sup> For comparison, the figure also shows the number of permanent immigrant visas issued in the employment-based (EB) green card preferences—i.e., green cards issued for the purpose of work, which allow migrants to adjust to become lawful permanent residents—over the same period. The dotted line in Figure A shows the point at which the last major immigration reform was passed in the United States, in November 1990, when the Immigration Act of 1990 (commonly referred to as IMMACT90) was enacted.

**Figure A.**

### Employment-based permanent immigrant visas and temporary nonimmigrant work visas issued, including principal and derivative beneficiaries, 1987–2019



**Notes:** The Immigration Act of 1990 was enacted on November 29, 1990. LPR stands for lawful permanent resident. Employment-based LPR refers to permanent immigrant visas in the employment-based preference categories, which confer permanent residence on the migrant beneficiary. For more background on employment-based permanent immigrant visas, see USCIS, “[Permanent Workers](#),” *Working in the United States*, last reviewed/updated Jan. 9, 2020.

**Source**

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<sup>12</sup> The data in Figure A do not represent the total population of temporary migrant workers or those with EB green cards who are currently authorized to be employed or who were authorized to be employed at a particular point in time—they only represent new visas issued in each year.

The major trends that have occurred since IMMACT90's enactment were that issuances of EB green cards increased slowly until stabilizing around the new annual cap for EB green cards of 140,000 (created by IMMACT90), while the number of temporary work visas issued increased exponentially during the same period. In 2019, the number of EB green cards issued represented only 8.6% of all new work visas issued to migrant workers and their families (temporary plus EB green cards). These data show that the labor migration pathways available to migrant workers and their families in the U.S. immigration system are almost exclusively temporary.<sup>13</sup>

The difference under Trump was that the steady growth in temporary work visa programs occurred while the Trump administration simultaneously, and successfully, made unprecedented moves to slash virtually every permanent immigrant pathway available in the U.S. system. Despite the Biden administration's stated commitments to restore the immigration system, budget and staffing shortfalls at USCIS have led to many of the green cards available in permanent categories from not being issued, and many are in danger of not being issued again by the end of fiscal year 2022<sup>14</sup>. In terms of reestablishing humanitarian pathways, while the Biden administration raised the refugee cap significantly to 125,000 for fiscal year 2022, statistics suggest that federal agencies will not come close to processing that many refugee visas in 2022.<sup>15</sup>

## Temporary migrant workers face unique challenges due to program frameworks

As discussed above, the U.S. labor migration system has shifted towards one that increasingly provides only temporary pathways to work. Yet, although migrants coming to the United States through temporary work visa programs are legally authorized to work, they are among the most exploited laborers in the U.S. workforce because employer control of their visa status leaves many powerless to defend and uphold their rights. Rather than being an issue of a few bad employers, the flaws in temporary work visa programs are systemic and structural. The list below summarizes some of the most problematic aspects of temporary work visa programs and how they impact workers.

### *Illegal recruitment fees and debt bondage are common*

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<sup>13</sup> For a more in-depth discussion of these data, see Daniel Costa, "[Temporary Migrant Workers or Immigrants? The Question for U.S. Labor Migration](#)," *Russell Sage Foundation Journal of the Social Sciences* 6, no. 3 (2020), <https://doi.org/10.7758/RSF.2020.6.3.02>.

<sup>14</sup> See for example, Walter Ewing, "[The Biden Administration Let Over 200,000 Green Cards Go to Waste This Year](#)," *Immigration Impact* (American Immigration Council blog), October 5, 2021; Andrew Kreighbaum, "[Immigration Agency Races to Issue 280,000 Available Green Cards](#)," *Bloomberg Law*, July 8, 2022.

<sup>15</sup> See for example, Migration Policy Institute, "[U.S. Refugee Admissions & Refugee Resettlement Ceilings, FY 1980-2022\\* \(thru April 2022\)](#)" [data tool; accessed July 17, 2022], showing that halfway through fiscal year 2022, fewer than 11,000 refugees have been admitted out of the 125,000 allotted by the Biden administration.

Temporary migrant workers can face abuse even before arriving in the United States: Many are required to pay exorbitant fees to labor recruiters to secure U.S. employment opportunities, even though such fees are usually illegal.<sup>16</sup> Those fees leave them indebted to recruiters or third-party lenders, which can result in a form of debt bondage.<sup>17</sup> (Even migrants recruited to work with employment-based green cards have ended up paying exorbitant fees, as seen in one case reported in *ProPublica*, in which a Korean worker paid \$26,000 to a recruitment agency to work in a poultry processing plant.<sup>18</sup>) After arriving in the United States, temporary migrant workers may find out the jobs they were promised don't exist.<sup>19</sup> And in a number of cases, temporary migrant workers have become victims of human trafficking—with some being forced to work in the sex industry.<sup>20</sup>

Contrary to popular belief, it's not just farmworkers and other temporary migrant workers in low-wage jobs suffering from the abuses that pervade temporary work visa programs: College-educated workers in computer occupations, as well as teachers and nurses, have been victimized and put in "financial bondage" by shady recruiters and staffing firms that steal wages, forbid workers from switching jobs or taking jobs the recruiters don't financially benefit from, and file lawsuits against workers if they try to change jobs or quit.<sup>21</sup>

### *Temporary work visa programs permit employers to circumvent U.S. anti-discrimination laws and segregate the workforce*

While U.S. anti-discrimination laws are intended to make workplaces fairer and more equal by prohibiting discrimination in hiring and employment on the basis of factors like race, color, sex, religion, and national origin at the point of hire—in practice they don't apply to

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<sup>16</sup> Centro de los Derechos del Migrante, [Recruitment Revealed: Fundamental Flaws in the H-2 Temporary Worker Program and Recommendations for Change](#), n.d., accessed December 10, 2020.

<sup>17</sup> United Nations Office of the High Commissioner for Human Rights, "[End of Visit Statement, United States of America \(6–16 December 2016\) by Maria Grazia Giammarinaro, UN Special Rapporteur in Trafficking in Persons, Especially Women and Children](#)," Washington, D.C., Dec. 19, 2016. See also United Nations Office of the High Commissioner for Human Rights, "[Debt Bondage Remains the Most Prevalent Form of Forced Labour Worldwide—New UN Report](#)" (press release), Sept. 15, 2016; United Nations Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences*, Thirty-third session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, July 4, 2016, accessed via the United Nations Official Document System (to access this report, open the [Official Document System](#) and then click [this link](#) while you have the Official Document System open); United Nations Office on Drugs and Crime, [The Role of Recruitment Fees and Abusive and Fraudulent Practices of Recruitment Agencies in Trafficking in Persons](#), 2015.

<sup>18</sup> Michael Grabell, "[Who Would Pay \\$26,000 to Work in a Chicken Plant?](#)" *ProPublica*, Dec. 28, 2017.

<sup>19</sup> Steven Greenhouse, "[Low Pay and Broken Promises Greet Guest Workers](#)," *New York Times*, Feb. 28, 2007.

<sup>20</sup> Liam Stack, "[Indian Guest Workers Awarded \\$14 Million](#)," *New York Times*, Feb. 18, 2015; Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, "[The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare](#)," *BuzzFeed News*, July 24, 2015; U.S. Department of Justice, "[Miami Beach Sex Trafficker Sentenced to 30 Years in Prison for International Trafficking Scheme Targeting Foreign University Students](#)" (press release), U.S. Attorney's Office, Southern District of Florida, March 24, 2017; Holbrook Mohr, Mitch Weiss, and Mike Baker, "[AP Impact: US Fails to Tackle Student Abuses](#)," *Associated Press*, Dec. 6, 2010; last updated Nov. 21, 2015.

<sup>21</sup> Matt Smith, Jennifer Gollan, and Adithya Sambamurthy, "[Job Brokers Steal Wages, Entrap Indian Tech Workers in US](#)," *Reveal News*, Oct. 27, 2014; Farah Stockman, "[Teacher Trafficking: The Strange Saga of Filipino Workers, American Schools, and H-1B Visas](#)," *Boston Globe*, June 12, 2013; Tom McGhee, "[Kizzy Kalu Lured Nurses to U.S. with Promises of High Pay, Prosecutors Say](#)," *Denver Post*, June 4, 2013.

temporary migrant workers who are recruited abroad. Because workers are being selected by recruiters in countries of origin, outside of U.S. jurisdiction, employers have the ability to reclassify entire sectors of the U.S. workforce by race, gender, national origin, and age through temporary work visa programs.<sup>22</sup>

This occurs through recruiters and employers limiting access to jobs made available to workers based on employer preferences for national origin, gender, and age, allowing them to sort workers into occupations and visa programs based on racialized and gendered notions of work. Thanks to temporary work visa programs, an employer may select an entire workforce composed of a single nationality, gender, or age group—for example, selecting only young Mexican men for farm jobs with H-2A visas, or young Indian men to work as computer programmers with H-1B visas, or young women from Eastern Europe for work in restaurants and amusement parks with J-1 visas. The large shares of visas issued to specific countries of origin, and the limited demographic data available, provide evidence that this is occurring,<sup>23</sup> and websites exist that allow employers to browse the profiles of workers on employment agency websites that advertise workers like commodities.<sup>24</sup>

Employers and recruiters can also weed out workers who might dare to speak out against unlawful employment practices, assert their legal rights, or organize for better working conditions by joining or forming a union. They can do this by refusing to hire workers whom they think will be likely to complain, and retaliating against workers who do speak up or complain—for instance, by firing them and effectively forcing them to leave the country, or by threatening to blacklist them from being hired for future job opportunities.

### *The visa status of temporary migrant workers is usually tied to their employer, thus chilling labor rights, preventing mobility, and enabling employer lawbreaking*

The many temporary migrant workers who are in debt after paying recruitment fees are anxious to earn enough to pay back what they owe and hopefully make a profit, and are thus unlikely to speak up at work when things go wrong on the job. But even those who aren't caught in the debt trap are often subject to exploitation once they are working in the United States. Like unauthorized immigrants, temporary migrant workers have good reason to fear retaliation and deportation if they speak up about wage theft, workplace abuses, or other working conditions like substandard health and safety procedures on the job—not because they don't have a valid immigration status, but because their visas are almost always tied to one employer that owns and controls their visa status. That visa status is what determines the worker's right to remain in the country; if they lose their job, they lose their visa and become

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<sup>22</sup> See, for example, Mary Bauer and Meredith Stewart, [Close to Slavery: Guestworker Programs in the United States](#), Southern Poverty Law Center, Feb. 19, 2013; International Labor Recruitment Working Group, [The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse](#), February 2013.

<sup>23</sup> See, for example, Justice in Motion, [Visa Pages: U.S. Temporary Foreign Worker Visas, H-2A Agricultural Work Visa](#), updated November 2015; U.S. Citizenship and Immigration Services, [“Buy American and Hire American: Putting American Workers First”](#) (data resources), 2020.

<sup>24</sup> See, for example, [Jobofer.org](#).

deportable. This arrangement results in a form of indentured servitude.<sup>25</sup> Further, as noted in the previous section, employers can punish temporary migrant workers for speaking out by not rehiring them the following year or by telling recruiters in countries of origin that they shouldn't be hired for other job opportunities in the United States (effectively blacklisting them).<sup>26</sup>

The specter of retaliation makes it understandably difficult for temporary migrant workers to complain to their employers and to government agencies about unpaid wages and substandard working conditions. Private lawsuits against employers who break the law are also an unrealistic avenue for enforcing rights, for two reasons: First, most temporary migrant workers are not eligible for federally funded legal services under U.S. law, and second, those who have been fired are unlikely to have a valid immigration status permitting them to stay in the United States long enough to pursue their claims in court. Because of the conditions created by tying workers to a single employer through their visa status, temporary work visa programs have been dubbed by some as “close to slavery” or “the new American slavery,” and government auditors have noted that increased protections are needed for temporary migrant workers.<sup>27</sup>

While temporary migrant workers generally cannot easily change jobs or employers, the terms and conditions of some nonimmigrant visas for college-educated workers actually do permit them to change employers—in particular the J-1, F-1 Optional Practical Training (OPT) program, H-1B, and TN visas allow workers to change employers—although the rules vary even among these visas. In the J-1 visa, which is managed by the State Department, there are sponsor organizations that partner with the State Department to manage oversight and compliance. Those private organizations act as middlemen between the J-1 workers and U.S. employers, and ultimately must sign off on a job change for a J-1 worker, rendering it difficult in practice. In the F-1/OPT context, universities play a key role and ultimately approve employment for OPT workers but exercise little oversight, sometimes resulting in abuses.<sup>28</sup>

It is important to stress that temporary migrant workers in these four visa programs that allow for some portability have nevertheless been subjected to substandard workplace conditions, and been the victims of fraud and even trafficking, which suggests that the ability to change employers, on its own, is not a panacea for protecting temporary migrant workers. Allowing temporary migrant workers to change employers is something that some proponents of expanded temporary work visa programs—like researchers from the Center

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<sup>25</sup> See, for example, Christopher Lapinig, “[How U.S. Immigration Law Enables Modern Slavery](#),” *The Atlantic*, June 7, 2017.

<sup>26</sup> See, for example, Mary Bauer and Meredith Stewart, [Close to Slavery: Guestworker Programs in the United States](#), Southern Poverty Law Center, Feb. 19, 2013.

<sup>27</sup> Mary Bauer and Meredith Stewart, [Close to Slavery: Guestworker Programs in the United States](#), Southern Poverty Law Center, Feb. 19, 2013; Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, “[The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare](#),” *BuzzFeed News*, July 24, 2015; U.S. Government Accountability Office, [H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers](#), GAO-15-154, reissued May 30, 2017.

<sup>28</sup> Nikhil Swaminathan, “[Inside the Growing Guest Worker Program Trapping Indian Students in Virtual Servitude](#),” *Mother Jones*, September/October 2017 issue.

for Global Development and the Cato Institute<sup>29</sup>—have proposed in lieu of additional labor standards enforcement. But the legal ability to change jobs does not alone provide protection from exploitation; while this is a pervasive assumption in basic economics, it is a generally incorrect assumption that is finally being called into question.<sup>30</sup> The ability to change employers should be a basic fundamental freedom for workers, not an excuse to abandon labor standards enforcement.

### *Temporary migrant workers are often legally underpaid*

There is abundant evidence that the laws and regulations governing major temporary work visa programs—such as H-2B and H-1B—permit employers to pay their temporary migrant workers much less than the local average wage for the jobs they fill.<sup>31</sup> For example, in the H-1B visa program—which has a prevailing wage rule that is intended to protect local wage standards—60% of all H-1B jobs certified by the U.S. Department of Labor (DOL) in 2019 were certified at a wage that was below the local average wage for the specific occupation.<sup>32</sup> And despite the wage rules in H-1B, there is evidence that wage theft of H-1B workers may be occurring on a massive scale.<sup>33</sup>

However, most work visa programs have no minimum or prevailing wage rules at all—perhaps that’s why some employers have believed they could get away with vastly underpaying their temporary migrant workers, as one Silicon Valley technology company in Fremont, California, did by paying less than \$2 an hour to skilled migrant workers from India on L-1 visas who were working up to 122 hours per week installing computers.<sup>34</sup>

While employers are still required by law to pay temporary migrant workers at least the state or federal minimum wage, that’s often far less than the true market rate, or the local average wage, for the occupation in which they are employed. The company employing the L-1 workers in Fremont who were paid less than \$2 an hour was cited for violations by DOL

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<sup>29</sup> Comments of Michael Clemens at “[Shared Border, Shared Future: A Blueprint to Regulate US-Mexico Labor Mobility](#),” an event hosted by the Center for Global Development, Sept. 13, 2016; Alex Nowrasteh, [How to Make Guest Worker Visas Work](#), Cato Institute, Jan. 31, 2013.

<sup>30</sup> See for example the Economic Policy Institute’s [Unequal Power](#) project, started in 2020, and see also, Economic Policy Institute, “[Ability to quit does not prevent employer exploitation](#),” virtual event on June 22, 2022.

<sup>31</sup> Daniel Costa, [The H-2B Temporary Foreign Worker Program: For Labor Shortages or Cheap, Temporary Labor?](#), Economic Policy Institute, Jan. 19, 2016; Ron Hira, “[New Data Show How Firms Like Infosys and Tata Abuse the H-1B Program](#),” *Working Economics Blog* (Economic Policy Institute), Feb. 19, 2015; Daniel Costa, “[H-2B Crabpickers Are So Important to the Maryland Seafood Industry That They Get Paid \\$3 Less Per Hour Than the State or Local Average Wage](#),” *Working Economics Blog* (Economic Policy Institute), May 26, 2017.

<sup>32</sup> Daniel Costa and Ron Hira, [H-1B Visas and Prevailing Wage Levels: A Majority of H-1B Employers—Including Major U.S. Tech Firms—Use the Program to Pay Migrant Workers Well Below Market Wages](#), Economic Policy Institute, May 4, 2020.

<sup>33</sup> Daniel Costa and Ron Hira, [New evidence of widespread wage theft in the H-1B visa program: Corporate document reveals how tech firms ignore the law and systematically rob migrant workers](#), Economic Policy Institute, December 9, 2021.

<sup>34</sup> Monte Francis, “[Fremont Tech Company Paid Workers \\$1.21 an Hour: U.S. Dept. of Labor](#),” *NBC Bay Area*, Oct. 22, 2014. See also George Avalos, “[Workers Paid \\$1.21 an Hour to Install Fremont Tech Company’s Computers](#),” *Mercury News*, Oct. 22, 2014; updated Aug. 12, 2016. L-1 visa status confirmed in an email from George Avalos of *Mercury News*, Oct. 23, 2014.

because California law required that they be paid no less than \$8 an hour (the state minimum wage at the time), plus time-and-a-half for overtime. But the average wage in Fremont for the job they were doing—installing computers—was \$20 per hour at the time according to DOL data, and if they were also configuring the computers for the company’s network, the going rate for their work would have been \$44 per hour.<sup>35</sup> In the end, the company was required to pay back wages of \$40,000 plus a fine of \$3,500 “because of the willful nature of the violations”—a slap on the wrist considering the egregiousness of the wage theft, and hardly a disincentive against future violations.<sup>36</sup>

Considering how the wage rules or lack thereof in these programs operate, and the situation workers are left in, perhaps it is no surprise there is evidence that temporary migrant workers in low-wage jobs earn approximately the same wages, on average, that unauthorized immigrant workers do for similar jobs, despite the fact that unauthorized workers have virtually no rights in practice.<sup>37</sup> In other words, these temporary migrant workers do not have any financial incentive to work legally through visa programs since there is no wage premium to be gained for it—and, in fact, authorized temporary migrant workers can end up worse off economically than unauthorized workers because of the debts they incur through fees paid to recruiters, and considering the fact that they may have no family or social networks to rely on. This could ultimately result in incentivizing workers to migrate without authorization, rather than using available legal channels.

In essence, these visa programs operate in practice to create a labor market monopsony for employers—awarding employers greater leverage over their workers<sup>38</sup>—and growing research has shown that even modest amounts of employer monopsony power are utterly corrosive to workers’ ability to bargain for better wages.<sup>39</sup>

### *Oversight is lacking, leaving temporary migrant workers unprotected*

There is very little oversight of temporary work visa programs by DOL. In fact, most of the programs have no rules in place at all to protect temporary migrant workers after they arrive in the United States. Where such rules *are* in place—namely in the H-1B, H-2A, and H-2B programs—enforcement is inadequate to protect workers, and companies that are frequent and extreme violators of the rules are often allowed to continue hiring through visa programs

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<sup>35</sup> Author’s analysis of historical data from Foreign Labor Certification Data Center, Online Wage Library, “7/2013 – 6/2014 FLC Wage Data,” <https://fldatacenter.com/Download.aspx>, for Standard Occupational Classification codes 15-1142 and 49-2011, for region 36084, Oakland-Fremont-Hayward, CA Metropolitan Division (2013–2014).

<sup>36</sup> U.S. Department of Labor, Wage and Hour Division, “US Department of Labor Investigation Finds Silicon Valley Technology Employer Owed More Than \$40,000 to Foreign Workers” (press release no. 14-1717-SAN [SF-71]), Oct. 22, 2014, accessed Aug. 27, 2019.

<sup>37</sup> Lauren A. Apgar, *Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers*, Economic Policy Institute, May 21, 2015.

<sup>38</sup> Bivens and Shierholz broadly define “monopsony power” as “the leverage enjoyed by employers to set their workers’ pay.” See Josh Bivens and Heidi Shierholz, *What Labor Market Changes Have Generated Inequality and Wage Suppression?: Employer Power Is Significant but Largely Constant, Whereas Workers’ Power Has Been Eroded by Policy Actions*, Economic Policy Institute, Dec. 12, 2018.

<sup>39</sup> Eric M. Gibbons et al., “*Monopsony Power and Guest Worker Programs*,” IZA Institute of Labor Economics, Discussion Paper no. 12096, January 2019.



with impunity.<sup>40</sup> Part of the problem lies with DOL's weak legal mandate, but is also due to the reality of DOL being woefully underfunded and understaffed. In fact, funding for DOL's Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) has remained flat over the past decade, while the number of workers they are responsible for protecting has increased sharply.<sup>41</sup> To put that into context, consider that in 2018, the budget for labor standards enforcement across all federal U.S. agencies was only \$2 billion, while spending on immigration enforcement in 2018 was \$24 billion, an astonishing *11 times greater* than spending to enforce labor standards—despite the mandate labor agencies have to protect 146 million workers employed at 10 million workplaces.<sup>42</sup> Consider as well that the Wage and Hour Division—the division at DOL in charge of enforcement in the H visa programs—had fewer investigators on staff in 2019 than it did almost five decades earlier, which explains the agency's limited capacity to conduct investigations.<sup>43</sup>

*Most temporary migrant workers cannot transition to a permanent immigrant status; in the few programs that offer a pathway, it is controlled by employers*

None of the U.S. temporary work visa programs provide for an automatic path to lawful permanent residence—i.e., obtaining a “green card”—which would also allow them to eventually qualify for naturalization (citizenship) after a few years, nor do they allow for a quick and direct path for temporary migrant workers to apply for green cards themselves. As a result, many temporary migrant workers return to the United States every year for decades in a nonimmigrant status, often for six to nearly 12 months at a time—rendering them permanently temporary in many respects—which also impacts their ability to integrate into the United States and prevents them from earning the higher wages associated with permanent residence and citizenship.<sup>44</sup>

Only two temporary work visa programs allow for a relatively straightforward application process for green cards, the H-1B and L-1 visas. But in those programs, it is the employer who decides whether the worker should get a green card; the employer also controls the green card application and process. This creates an imbalance of power between temporary migrant workers and their employers that allows employers to exert undue influence over the lives of their workers with visas, and disincentivizes workers from speaking up about workplace abuses, as speaking up could jeopardize their ability to remain in the United States.

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<sup>40</sup> Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, “[Employers Abuse Foreign Workers. U.S. Says, by All Means, Hire More](#),” *BuzzFeed News*, May 12, 2016.

<sup>41</sup> Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, “[Worker protection agencies need more funding to enforce labor laws and protect workers](#),” *Working Economics* blog (Economic Policy Institute), July 29, 2021.

<sup>42</sup> Daniel Costa, “[Immigration Enforcement Is Funded at a Much Higher Rate Than Labor Standards Enforcement—and the Gap Is Widening](#),” *Working Economics* Blog (Economic Policy Institute), June 20, 2019.

<sup>43</sup> Daniel Costa, Philip Martin, and Zachariah Rutledge, *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, Economic Policy Institute, December 2020.

<sup>44</sup> See, for example, Sankar Mukhopadhyay and David Oxborrow, “[The Value of an Employment-Based Green Card](#),” *Demography* 49 (February 2012): 219–237, <https://doi.org/10.1007/s13524-011-0079-3>; Manuel Pastor and Justin Scoggins, *Citizen Gain: The Economic Benefits of Naturalization for Immigrants and the Economy*, Center for the Study of Immigrant Integration, University of Southern California, December 2012.

Even when employers decide to apply for green cards for the temporary migrant workers who are eligible, workers can end up in what's known as the green card "backlog," waiting years and even decades for a green card to become available to them. The Congressional Research Service has estimated that approximately 1 million temporary migrant workers are in the green card backlog.<sup>45</sup> During their time in the backlog, workers can experience an employment relationship that is ripe for exploitation, because workers are unable to switch easily between jobs or employers by virtue of their prolonged temporary status.

### *Many temporary migrant workers are separated from their families while employed in the United States*

While many temporary work visa programs technically allow migrant workers to bring their spouses and children, in most cases U.S. visa rules do not authorize spouses to work—making it difficult, if not impossible, for spouses and children to accompany workers because of the high cost of living and low pay in work visa programs. Taking into consideration that so many temporary migrant workers return every year for decades, workers and their family members can end up facing prolonged separation and trauma—children may grow up hardly knowing, or ever seeing, one or both of their parents.

## The H-2A and H-2B visa programs: Recent, rapid growth

While the preceding sections discussed issues that cut across all U.S. temporary work visa programs, the following sections will focus on the H-2A and H-2B visa programs.

H-2A and H-2B are two of many U.S. temporary work visa programs.<sup>46</sup> The Immigration and Nationality Act of 1952 first created some of the current temporary work visas, including the H-2 visas for foreign nationals "coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."<sup>47</sup> In 1986, the Immigration Reform and Control Act (IRCA) split the H-2 visa into two separate visas, the H-2A for temporary workers employed in agricultural occupations and H-2B for temporary workers in occupations outside of agriculture.<sup>48</sup> H-2A is explicitly for temporary and seasonal jobs in agriculture, and in practice mostly used for crop farming, and the H-2B program is intended to be used when non-agricultural employers face labor shortages in seasonal jobs. The most common occupations in H-2B are landscaping, construction, forestry, seafood and meat processing, traveling carnivals, restaurants, and hospitality. The H-2A visas program has no annual numerical limit or "cap." In H-2B however, legislation enacted subsequent to IRCA, the Immigration Act of 1990, established an annual numerical limit of 66,000 H-2B visas that could be issued

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<sup>45</sup> William Kandel, *The Employment-Based Immigration Backlog*, Congressional Research Service, R46291, March 26, 2020.

<sup>46</sup> Daniel Costa, *Temporary work visa programs and the need for reform: A briefing on program frameworks, policy issues and fixes, and the impact of COVID-19*, Economic Policy Institute, February 3, 2021.

<sup>47</sup> *Immigration and Nationality Act of 1952*, Section 101(a)(15)(h)(ii).

<sup>48</sup> *Immigration Reform and Control Act*, Section 301(a).

annually, and which took effect in fiscal year 1992.<sup>49</sup> This annual numerical limit of 66,000 visas is often referred to as the H-2B annual “cap.”

In this section I will begin with a discussion about the current size of both programs. The H-2A program has expanded rapidly over the past decade and the H-2B visa program, despite the annual cap of 66,000 per fiscal year, has grown quickly since 2016, when Congress began to include riders to create supplemental visas beyond the H-2B annual cap.

*The size of the H-2A program has tripled over the past decade, and over half of jobs are located in just five states*

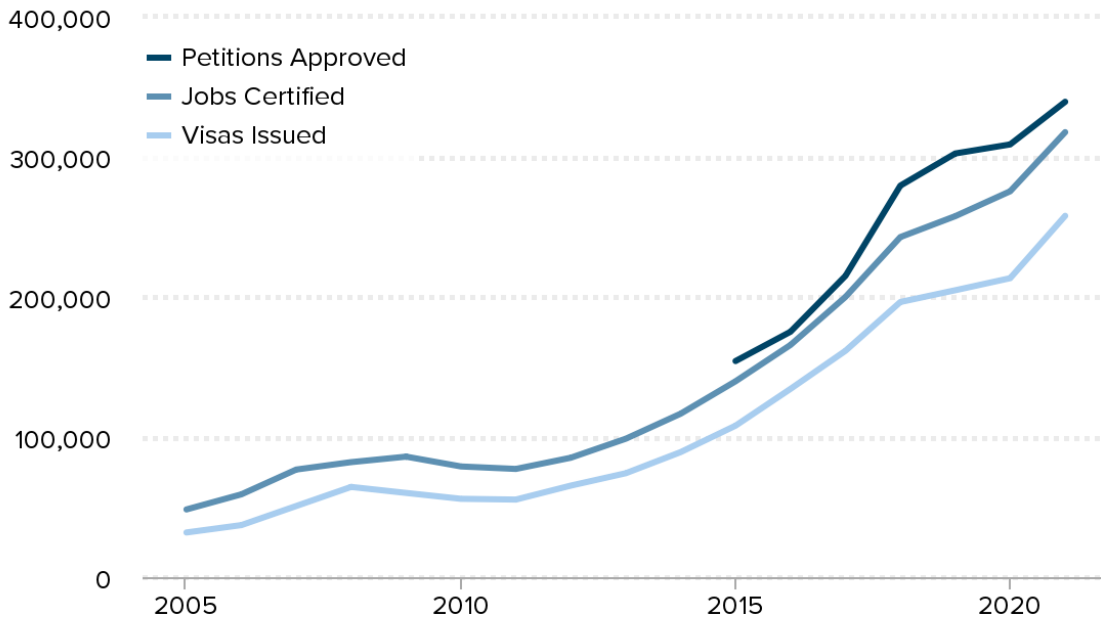
As **Figure B** shows below—whether by the number of jobs certified by the U.S. Department of Labor (DOL) or the number of visas issued by the State Department—the size of the H-2A program has more than tripled over the last decade. In 2012, DOL certified 85,248 jobs for H-2A, and in 2021, there were 317,619 certified jobs. In 2012, the State Department issued 65,345 H-2A visas, and in 2021, issued 257,898.

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<sup>49</sup> [Immigration Act of 1990](#), Section 205(g)(1)(B).

**Figure B.**

### H-2A jobs certified and visas issued, 2005–2021, and petitions approved, 2015–2021



**Notes:** All references to a particular year should be understood to mean the U.S. government’s fiscal year (October 1–September 30).

**Source:** U.S. Department of Labor, Office of Foreign Labor Certification, [OFLC Performance Data](#); U.S. Department of State, Bureau of Consular Affairs, [“Nonimmigrant Visa Statistics”](#); U.S. Department of Homeland Security, United States Citizenship and Immigration Services, [H-2A Employer Data Hub](#).

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Because three separate agencies are involved in managing the H-2A visa program, it is difficult to know the exact number of H-2A workers employed in the United States: DOL reviews and adjudicates applications for job certifications, USCIS in the Department of Homeland Security reviews and adjudicates petitions, and State issue or denies visas. This leads to three separate data sources which offer a different picture of the size of the program (see the three lines on the chart in Figure B).

In my opinion, the best methodology for estimating the size of the H-2A workforce is to add the number of new visas issued by State and adding the number of H-2A approvals for

continuing employment (in other words, visa extensions) by USCIS.<sup>50</sup> This is because H-2A visas issued represent new H-2A workers and extensions by USCIS represent H-2A workers who did not leave the United States because USCIS approved them to remain and continue working at their job.

In 2021, State issued 257,898 visas. USCIS H-2A employer data hub shows there were 43,020 approved petitions for continuing employment, leading to a total of 300,918 H-2A workers employed in 2021. According to 2020 labor certification from DOL, we know that on average, H-2A jobs were certified for 168 days, which is just under six months.<sup>51</sup> Since each H-2A job is certified on average for six months, that means that 300,918 six-month H-2A jobs is equal to 150,459 full-time equivalent jobs filled with H-2A workers.

Finally, **Figure C** from *Rural Migration News* at the University of California, Davis, shows that over half of the H-2A jobs certified by DOL had worksites located in just five states: California, Florida, Georgia, North Carolina, and Washington.<sup>52</sup> The share of H-2A jobs that these states accounted for rose from 34% in 2007 to 52% in 2021, meaning that much of the growth in the H-2A program has been accounted for by the growth in these five states in the southeast and west.

### Figure C.

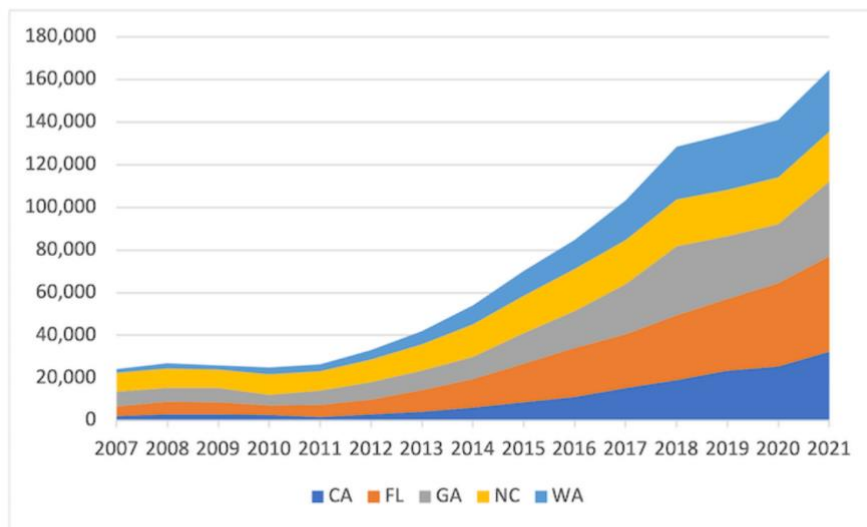
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<sup>50</sup> Data on H-2A petitions approved for continuing employment are only available from USCIS going back to fiscal year 2015. See USCIS, [H-2A Employer Data Hub](#) [last accessed July 17, 2022].

<sup>51</sup> Philip Martin, "[The H-2A Program in 2021](#)," The Wilson Center, June 21, 2021.

<sup>52</sup> Rural Migration News, "[The H-2A Program in 2022](#)," University of California, Davis, May 16, 2022.

**The top five states had 52% of H-2A jobs in Fiscal Year 2021; in California and Washington H-2A rose the fastest**



**Note:** Numbers represent approved job certifications for H-2A by the Office of Foreign Labor Certification in the Employment and Training Administration, U.S. Department of Labor, in five states: California, Florida, Georgia, North Carolina, and Washington.

**Source:** Figure reproduced with permission from author. Rural Migration News, "The H-2A Program in 2022," University of California, Davis, May 16, 2022.

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*New data reveal the size of the H-2B program in 2021 nearly equaled its record high*

While, as noted above, the annual cap for the H-2B program has been set in law at 66,000 since 1992, in recent years the number of H-2B workers has been much higher, due mostly to congressionally authorized increases every year, along with extensions and exemption from the cap. The first temporary modification to the H-2B cap occurred during fiscal years 2005-2007, when Congress passed a law putting in place a temporary “returning worker exemption” during those years that allowed migrant workers who had been employed with an H-2B visa in any one of the previous three fiscal years to not be counted against the annual cap. As a result, the H-2B program reached its high point of 129,547 in fiscal year 2007.<sup>53</sup> It should be noted that because of extensions and exemptions from the cap, the actual number of H-2B workers was likely higher in 2007, but the true number is unknown because those data on visa extensions are not publicly available.

New data from the USCIS H-2B Employer Data Hub that were first published in 2021 provide new insights into the current size of the H-2B program and the impact of the returning worker and supplemental H-2B visas that have been added since fiscal year 2016.

<sup>53</sup> Andorra Bruno, [The H-2B Visa and the Statutory Cap](#), Congressional Research Service, R44306, updated February 28, 2020.

Previously, similar to H-2A, the best available information on the size of the H-2B program came from disclosure data on labor certifications, which are published by the Department of Labor (DOL), and the number of visas issued, which is published by the State Department. Labor certifications, however, do not consider the H-2B cap—in other words, DOL will continue to approve them even if the H-2B cap has been reached. Therefore these certifications show only the number of H-2B jobs that have been certified by DOL to be filled with H-2B workers, not the actual number of H-2B workers who are ultimately employed. Once DOL has certified the jobs employers wish to fill, the employers must then petition USCIS for H-2B workers. Before USCIS approves an H-2B petition, it must consider whether the H-2B job and petition fall under the annual cap. The result of this process is that every year there are many more labor certifications from DOL than there are petitions that are ultimately approved by USCIS allowing employers to hire H-2B workers.

The State Department’s publication of the number of visas issued is another important data source, but these data do not account for H-2B workers who had their visas extended and remained in the United States beyond the initial fiscal year for which they were approved, or for H-2B workers who may have switched into H-2B from another status. For these reasons, the State Department data are also an imperfect source for measuring the number of H-2B workers.

Data from the USCIS H-2B Employer Data Hub, on the other hand, since it represents individual jobs that USCIS has approved to be filled with H-2B workers, and includes data on visa extensions, is the best available tool for measuring the total number of workers employed in H-2B status. However, as noted in the box on data above, there are caveats.

For one, the number of approvals in the USCIS H-2B data may overcount the number of individual H-2B workers. That’s because in cases in which a worker was changing jobs or changing job conditions with the same employer, that individual may appear twice in the database; however USCIS does not identify when an approval is for an H-2B worker changing jobs or job conditions.

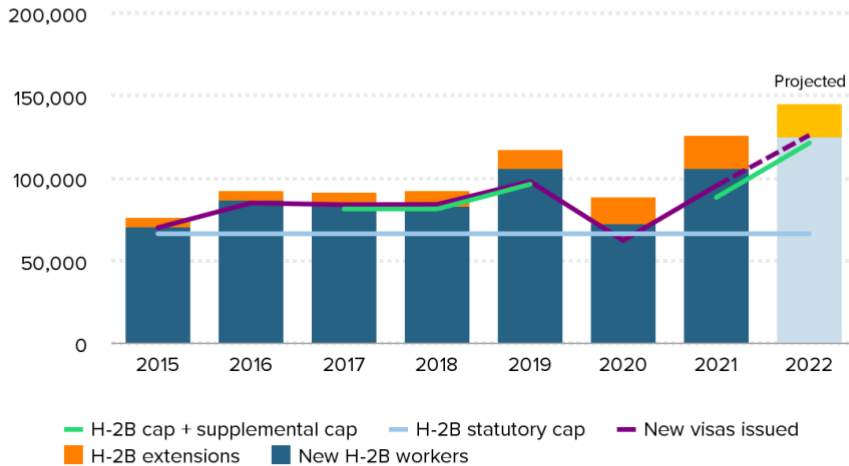
In addition, there is not a direct correspondence between the number of H-2B petitions and the number of H-2B workers ultimately employed because visas for workers with approved USCIS petitions may be denied at the consular level by the State Department. In my estimate on the number of H-2B workers I account for this by subtracting the number of H-2B visas denied by the State Department from the number of petitions approved by USCIS for new employment.

USCIS H-2B Data Hub data are available only going back to 2015—the year immediately before Congress first expanded the H-2B program through an appropriations rider—but those data at least permit us to see what the baseline number of H-2B workers employed was before the expansions via supplemental visas. **Figure D** shows that in 2015, while the statutory cap of 66,000 was still in place—the total number of H-2B workers approved by USCIS was 85,793, of which 79,603 were new approvals and 6,190 were visa extensions. A total of 9,188 H-2B visa applications were denied by the State Department at the consular stage. After subtracting visa denials, the total estimated number of H-2B workers in 2015 is 76,605.

Figure D.

## The H-2B visa program is nearly double the size of the original annual cap and set to grow larger

H-2B workers employed in the United States according to approved USCIS petitions and visas issued by the State Department, FY 2015–21, and projected H-2B workers in 2022



**Note:** "New H-2B workers" column represents USCIS petitions for H-2B workers approved for new employment, minus the number of visas denied for H-2B workers in the same fiscal year (see text). "H-2B visa extensions" represents USCIS petitions for H-2B workers approved for continuing employment (i.e. visa extensions). The line labeled "New visas issued" represents the number of H-2B visas issued by the State Department in the corresponding fiscal year. The "H-2B statutory cap" is set in law at 66,000 new H-2B visas per year. The line labeled "H-2B cap + supplemental cap" is the number of H-2B visas authorized in the statutory cap plus the number of supplemental visas authorized by Congress and the executive branch for the corresponding fiscal year. The column labeled "Projected" are totals that have been projected for fiscal year 2022 (see text).

**Source:** EPI analysis of United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2B Employer Data Hub](#), fiscal year 2015-2021 data files, and U.S. Department of State, "[Nonimmigrant Visa Statistics](#)" [see PDF files for tables listed under "Nonimmigrant Worldwide Issuance and Refusal Data by Visa Category" and "Nonimmigrant Visas by Individual Class of Admission" for fiscal years 2015-2021].

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In 2021, when 22,000 supplemental H-2B visas were added to the statutory cap of 66,000, for a total cap of 88,000, USCIS approved a total of 132,101 petitions for H-2B workers. The 132,101 H-2B workers included 112,546 new H-2B workers and 19,555 visa extensions. However 5,911 visas were denied in 2021. After subtracting denied visas, the total number of H-2B workers for 2021 was 126,190. The 2021 total was nearly double the size of the annual cap and came close to the record high of 129,547 from 2007.

It must also be noted that there are some discrepancies in the H-2B data reported by USCIS that have not been explained by the agency. For example, while the data in the 2021 USCIS H-2B Employer Data Hub show there were 132,101 total approvals for H-2B workers, the USCIS



*Characteristics of H-2B Nonagricultural Temporary Workers* report shows that there were 134,654 total H-2B petitions approved.<sup>54</sup> The number of new approved workers in 2021, at 112,546, is much higher than the annual cap plus the number of permitted supplemental visas for 2021, which totaled 88,000. There were only 10,665 approvals in the Data Hub data for new H-2B workers that were exempt from the cap in 2021, a number much lower than the 24,546 difference between the authorized 88,000 visas and the 112,546 petitions approved for 2021. One possibility is that the difference is made up of H-2B workers with petition approvals to change employers or change job conditions. However, the USCIS data are not detailed enough to allow us to discern between the different types of approvals and USCIS has not reported or suggested anywhere that this is the case. All of this raises the question of whether USCIS is approving more H-2B petitions than allowed by law.

### *The size of the H-2B program is projected to reach a new high in 2022*

The number of H-2B workers is set to grow higher still in fiscal year 2022. As discussed above, the Biden administration has added 55,000 supplemental H-2B visas to the 66,000 annual cap, setting the total limit for the year at 121,000. The last bar in Figure D (labeled “Projected”) shows an estimate of the number of H-2B workers for 2022. I construct the 2022 estimate as follows: First, I take the number of H-2B workers in the cap set by the Biden administration of 121,000 for 2022. I then add 10,665 additional workers, using the number of new H-2B workers from 2021 that were exempt from the annual cap, according to the USCIS H-2B Employer Data Hub. Then I subtract from that total 5,911, the number of visas that were denied by the State Department in 2021. Finally, I add the number of visa extensions from 2021 (19,555). The final result is a projected total of 145,301 H-2B workers for 2022, a new record high and more than double the original statutory annual cap.<sup>55</sup>

## The H-2A and H-2B visa programs: Wage and hour enforcement statistics show that workers are vulnerable in the workplace

Why does it matter that the H-2A and H-2B programs have grown in recent years? Because while the H-2A and H-2B programs continue to expand—with further growth expected, and the Biden administration making H-2 programs a central component of their Collaborative Migration Management Strategy for Central and North America—at the same time, data on labor standards enforcement from the Wage and Hour Division make clear that farmworkers in agriculture, including H-2A workers, and all workers in H-2B industries are not adequately protected in the workplace. As the program expansions continue, much more must be done to ensure that both temporary migrant workers and U.S. workers are paid and treated fairly. This section discusses some of the available data on wage and hour enforcement in H-2A and H-2B industries.

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<sup>54</sup> USCIS, [Characteristics of H-2B Nonagricultural Temporary Workers, Fiscal Year 2021 Report to Congress](#), March 10, 2022; see Table 3 on page 7.

<sup>55</sup> Since the number of H-2B extensions is likely to be larger in 2022 due to a larger pool of H-2B workers in 2021, the 2021 total for extensions used here is likely an undercount of the number of extensions in 2022 (see discussion about cap exemptions and extensions).

## *Inadequate labor standards enforcement in agriculture leaves all farmworkers vulnerable to wage theft and other violations*

Farmworkers in the United States earn some of the lowest wages in the labor market and experience an above-average rate of workplace injuries.<sup>56</sup> In addition, a large share of them are also vulnerable to exploitation and abuse in the workplace because of their immigration status.

The U.S. Department of Labor’s National Agricultural Workers Survey reports that 44% of the non-H-2A crop workers were unauthorized immigrants in 2019–2020,<sup>57</sup> and as discussed above there were just over 300,000 H-2A workers employed in the United States in 2021, who worked for an average of six months out of the year, representing roughly 10% to 15% of farmworkers employed on U.S. crop farms. Both unauthorized and H-2A workers have limited labor rights and are vulnerable to wage theft and other abuses due to their immigration status.<sup>58</sup> The remaining farm workforce, roughly half of all farmworkers, are U.S. citizens and legal immigrants with full rights and agency in the labor market. But that means that roughly half of all farmworkers are vulnerable to violations of their rights because of their lack of an immigration status or their precarious, temporary immigration status.

The U.S. Department of Labor’s (DOL) Wage and Hour Division (WHD) is the federal agency that protects the rights of farmworkers in terms of wage and hour laws, including those that protect H-2A workers. WHD labor standards enforcement actions are intended to ensure that the rights of workers are protected, and to level the playing field for employers, so that employers that underpay workers or engage in other cost-reducing behavior in violation of wage and hour laws do not gain a competitive advantage over law-abiding employers. WHD aims to “promote and achieve compliance with labor standards to protect and enhance the welfare of the nation’s workforce” by enforcing 13 federal labor standards laws, including the Fair Labor Standards Act (FLSA), which requires minimum wages and overtime pay, and regulates the employment of workers who are younger than 18, as well as the Family and Medical Leave Act, and laws governing government contracts, consumer credit, and the use of polygraph testing, etc.<sup>59</sup> WHD also enforces two laws and their implementing regulations specific to agricultural employment. One is the Migrant and Seasonal Agricultural Worker

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<sup>56</sup> Daniel Costa, “[The farmworker wage gap continued in 2020: Farmworkers and H-2A workers earned very low wages during the pandemic, even compared with other low-wage workers](#),” *Working Economics Blog* (Economic Policy Institute), July 20, 2021; Bureau of Labor Statistics, *Injuries, Illnesses, and Fatalities*, “[Table 1. Incidence Rates of Nonfatal Occupational Injuries and Illnesses by Industry and Case Types, 2019](#)” [online table]. Accessed October 2020.

<sup>57</sup> National Agricultural Workers Survey, [Data Tables for 2019-2020](#), Employment and Training Administration, U.S. Department of Labor.

<sup>58</sup> Annette Bernhardt, Ruth Milkman, et al., [Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities](#), Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, September 2009; Lauren Apgar, [Authorized Status, Limited Returns: The Labor Market Outcomes of Temporary Mexican Workers](#). Economic Policy Institute, May 21, 2015.

<sup>59</sup> Wage and Hour Division, U.S. Department of Labor, [Laws Administered and Enforced](#) (last accessed July 17, 2020).

Protection Act (MSPA), the major federal law that protects U.S. farmworkers. The other is the statute that establishes the H-2A program.

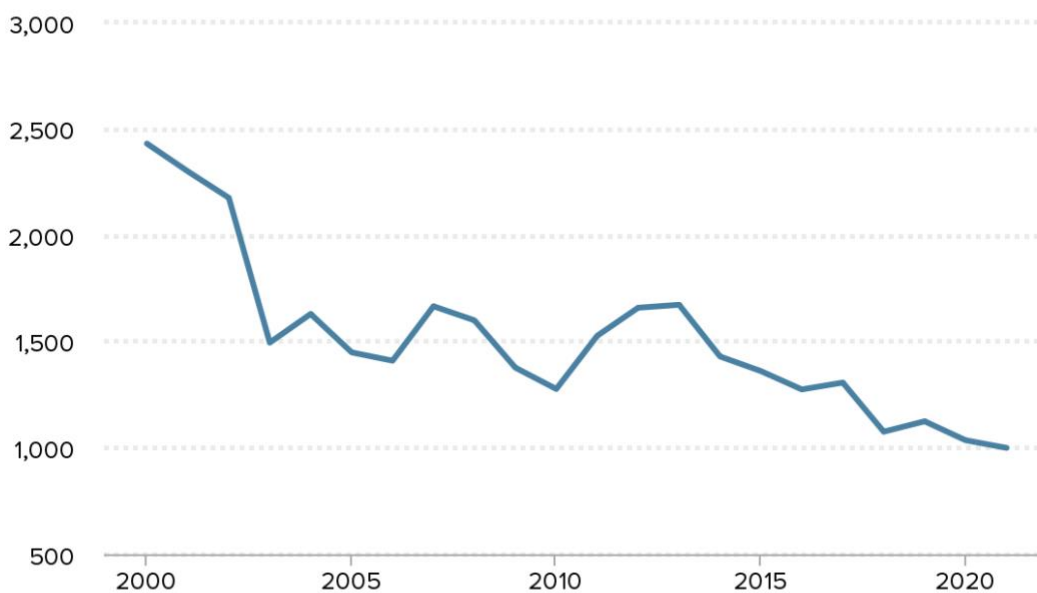
In December 2020, Dr. Philip Martin, Dr. Zach Rutledge, and I published a lengthy report analyzing 20-years of data from WHD on their enforcement actions in agriculture.<sup>60</sup> The rest of this section highlights some of the key findings and updates some of the data findings.

First, it is important to note that the number of WHD investigations in agriculture has declined sharply since the year 2000. **Figure E** shows a clear downward trend in the number of WHD investigations at agricultural worksites over the past two decades, from more than 2,000 a year in the early 2000s to just 1,000 in fiscal year 2021.

**Figure E.**

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### Wage and Hour Division investigations of agricultural employers, fiscal years 2000–2021



**Source:** Authors' analysis of U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#).

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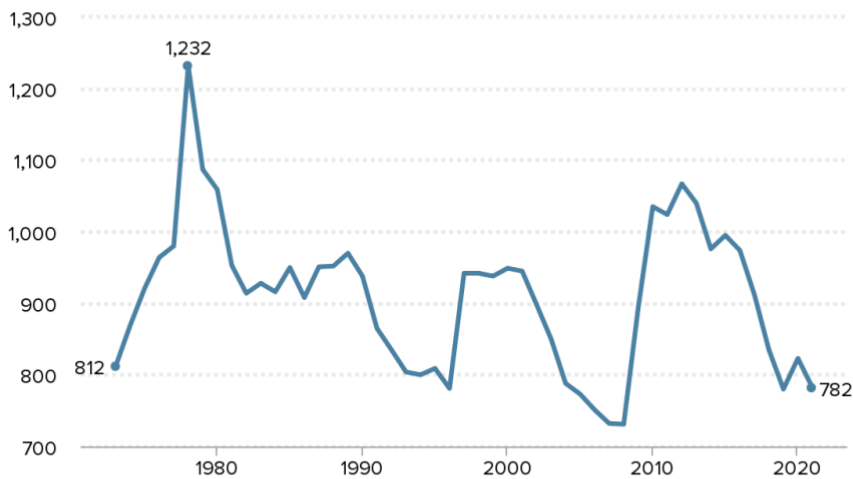
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<sup>60</sup> Daniel Costa, Philip Martin, and Zachariah Rutledge, [Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers](#), Economic Policy Institute, December 15, 2020.

What explains fewer investigations of farm employers? While labor enforcement priorities vary by administration, funding for WHD has lagged behind the growth of the U.S. labor force. In inflation-adjusted dollars, WHD’s budget in 2020 was \$13 million less than it was in 2012.<sup>61</sup> **Figure F** shows that in 2021 there were only 782 WHD investigators enforcing federal labor standards, 30 fewer than in 1973. Hamaji et al. note that in 1978, there was one WHD investigator for every 69,000 U.S. workers; by 2018, there was one investigator for every 175,000 U.S. workers.<sup>62</sup> And as noted earlier, funding for DOL’s WHD and OSHA has remained flat over the past decade, while the number of workers they are responsible for protecting has increased sharply.<sup>63</sup>

**Figure F.**

**Number of Wage and Hour Division investigators, U.S. Department of Labor, 1973–2021**



**Note:** Numbers represent Wage and Hour Division investigators on staff at the end of each year.

**Source:** Authors’ analysis of Wage and Hour Division data on the number of investigators; from unpublished Excel files provided by WHD staff members to the author. For 2020 and 2021, source is Rebecca Rainey, “Wage-Hour Investigator Hiring Plans Signal DOL Enforcement Drive,” Bloomberg Law, January 28, 2022.

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Nonetheless, **Figure G** shows that despite fewer investigations and WHD investigators, the total back wages owed for all violations of federal wage and hour laws in agriculture has been

<sup>61</sup> Authors’ analysis of WHD budget data, see U.S. Department of Labor, [FY 2020 Department of Labor Budget Summary Tables](#).

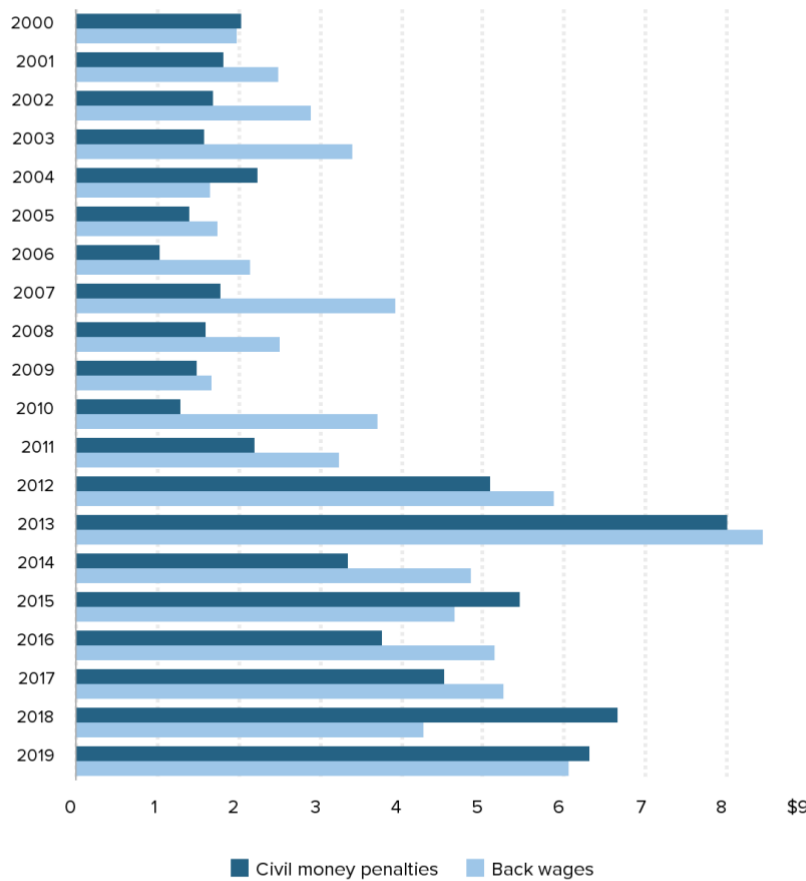
<sup>62</sup> Kate Hamaji, Rachel Deutsch, et al., [Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers are Fighting Back](#). Economic Policy Institute, May 2019.

<sup>63</sup> Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, “[Worker protection agencies need more funding to enforce labor laws and protect workers](#),” *Working Economics* blog (Economic Policy Institute), July 29, 2021.

on a generally upward trend, peaking at \$8.4 million in FY2013 (in constant 2019 dollars), the same year that civil money penalty assessments peaked at \$8.0 million. Annual back wages and CMPs were between \$3.8 million and \$6.7 million between 2015 and 2019 (in 2019 dollars). The latest data released by WHD shows that in 2021, with 1,000 investigations in agriculture, 10,379 workers were assessed to be owed back wages, with a total of \$8.4 million total owed back wages for agricultural workers (in 2021 dollars) and over \$7.4 million assessed to agricultural employers in civil money penalties.<sup>64</sup>

**Figure G.**

**Back wages and civil money penalties assessed (in millions of dollars) against agricultural employers by the Wage and Hour Division, fiscal years 2000–2019**



**Note:** Data are inflation adjusted to 2019 dollars.

**Source:** Authors' analysis of U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#) (U.S. DOL-WHD 2020a).

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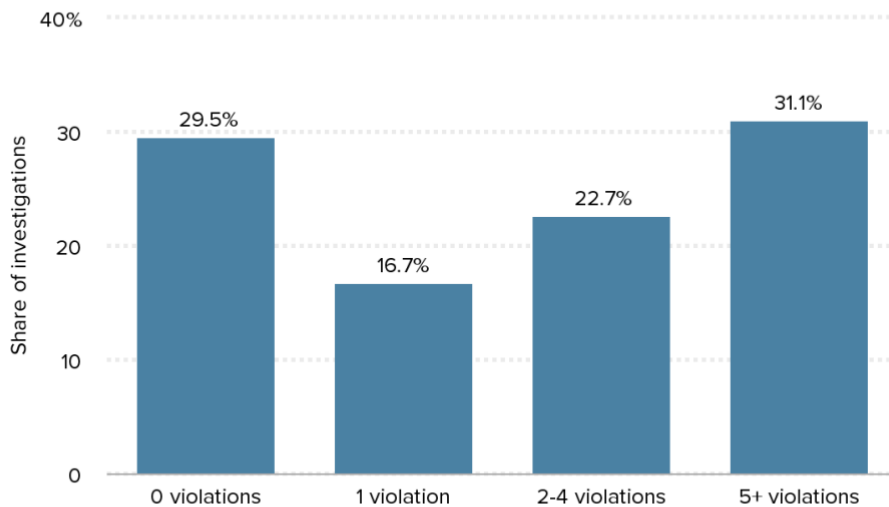
<sup>64</sup> U.S. Department of Labor, Wage and Hour Division, [Agriculture data table](#).

In addition, despite fewer investigations, it is the case that when WHD initiates an investigation of an agricultural employer, they often find violations. **Figure H** groups the number of violations found per investigation during the FY2005–FY2019 period, from zero to more than five violations per investigation. When looked at this way, the data reveal a U-shape among the violators, with almost 30% of investigations bunched at the zero and 31% bunched at more than five violations; those two ends of the spectrum account for almost two-thirds of the violations, while 17% of investigations found one violation and 23%, nearly a quarter, found two to four violations. However, overall, *the data show that 70% of all investigations detected violations*, while 30% detected zero violations. In addition, it should be noted that this figure does not account for the severity of the violations or the amounts assessed. In other words, some investigations that detected one or two violations may have detected egregious violations and found employers owing large amounts of back pay, while investigations that detected with five or more violations may have resulted in smaller amounts of back wages owed.

**Figure H.**

### Over 70% of federal investigations of agricultural employers detected wage and hour violations

Violations detected during investigations of agricultural employers, by number of violations found per investigation, fiscal years 2005–2019



**Note:** Data include H-2A, MSPA, FLSA, and all other types of employment law violations in the agricultural sector.

**Source:** Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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One particular area of interest to highlight with respect to wage and hour enforcement in agriculture is the employment of farmworkers by farm labor contractors (FLCs). FLCs are nonfarm employers that act as staffing firms for farm employers. For FLCs, which correspond to NAICS code 115115, average employment was 181,000 in 2019, according to the Quarterly Census of Employment and Wages from DOL; FLCs are a subset of the Support Activities for Crop Production category (NAICS 1151), which had average employment of 342,000 in 2019, meaning that FLCs accounted for 53% of U.S. crop support services employment.

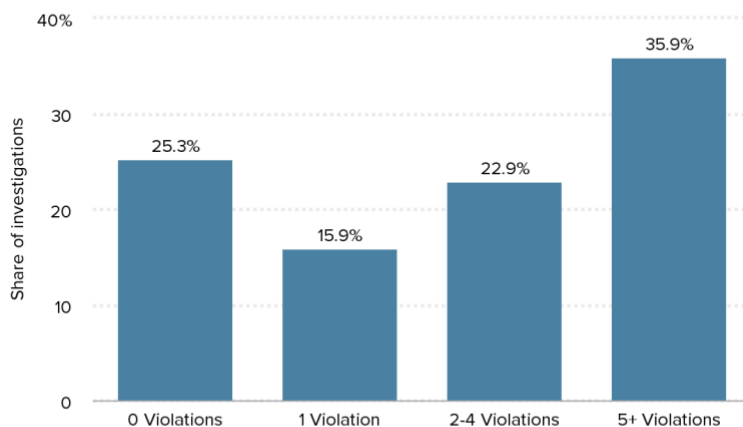
FLCs accounted for 14% of total average employment in UI-covered agriculture of 1.3 million in 2019—including employment in both crops and animal agriculture—but accounted for one-quarter of all wage and hour law violations detected in agriculture (24%). Thus, the share of agricultural employment law violations committed by farm labor contractors was 10 percentage points greater than the FLC share of average annual agricultural employment. In practical terms, that means that farmworkers employed by FLCs or on farms that use FLCs are more likely to suffer wage and hour violations than farmworkers who are employed by farms directly.

We also found that 75% of all WHD investigations of FLCs detected violations, while 25% of investigations detected zero violations. We grouped the number of violations detected per investigation of FLCs, as shown in **Figure I**. The share of investigations of FLCs that found zero violations, at 25%, was significantly less than the share of investigations of FLCs that found five or more violations, 36%. Nearly two-fifths of investigations detected either one violation or two to four violations.

**Figure I.**

### Three-fourths of federal investigations of farm labor contractors detected wage and hour violations

Violations detected during investigations of farm labor contractors, by number of violations found per investigation, fiscal years 2005–2019



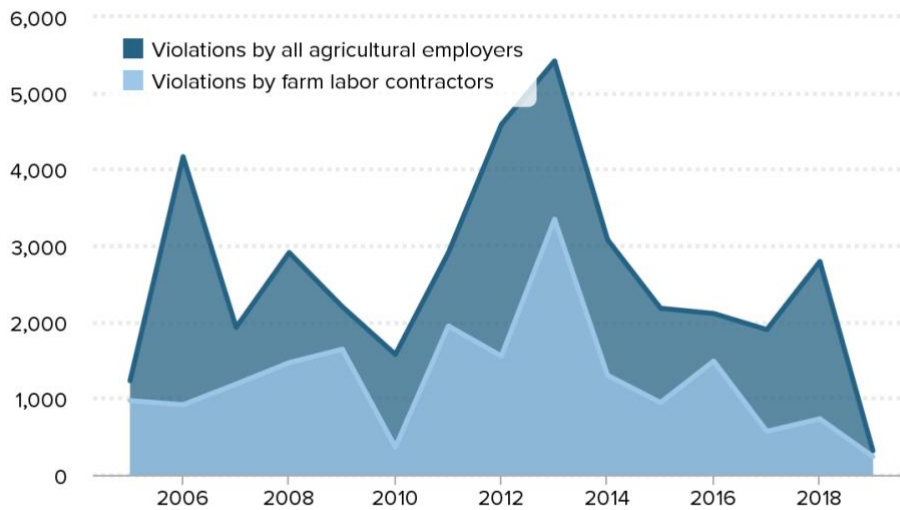
Source: Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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We also reviewed violations by FLCs in the two major agricultural states of California and Florida. California and Florida each accounted for 14% of the wage and hour violations detected as the result of WHD investigations nationwide, by far the most, followed by North Carolina with 10%, Texas and Washington with 5% each, and Oregon with 4%. These six states accounted for 52% of all employment law violations found in agriculture. In the two states with the highest shares of violations, California and Florida, FLCs accounted for the largest share of the violations detected by WHD investigators. **Figure J** shows that FLCs accounted for 48% of the total violations in California during fiscal years 2005 to 2019, and **Figure K** shows that FLCs accounted for 50% of the total violations detected in Florida over the same period. This finding is particularly significant for California, given that FLCs now account for a majority of crop employment in the state.<sup>65</sup>

**Figure J.**

**Employment law violations detected in California by the Wage and Hour Division among all agricultural employers and farm labor contractors, fiscal years 2005–2019**



**Note:** Violations by California farm labor contractor are a subset of employment law violations detected among all agricultural employers in California.

**Source:** Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

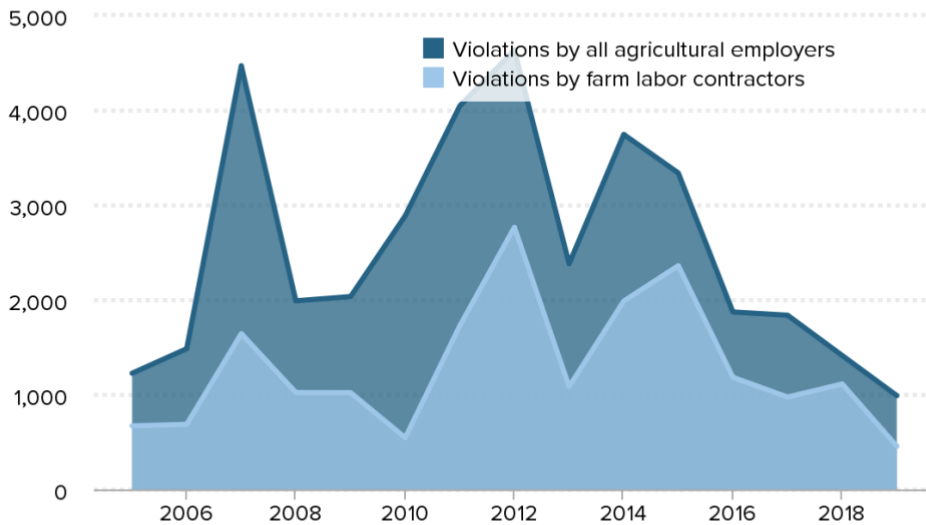
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<sup>65</sup> Rural Migration News, "[California: FLC Employment Down and Wages Up in 2020](#)," University of California, Davis, July 16, 2021.



**Figure K.**

**Employment law violations detected in Florida by the Wage and Hour Division among all agricultural employers and farm labor contractors, fiscal years 2005–2019**



**Note:** Violations by Florida farm labor contractor are a subset of employment law violations detected among all agricultural employers in Florida..

**Source:** Authors' analysis of U.S. Department of Labor, *Wage and Hour Compliance Action Data* (U.S. DOL-WHD 2020f).

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To conclude, it is within this context H-2A workers are employed; where there are fewer investigations and fewer WHD investigators policing the farm labor market, where thousands of workers are robbed by farm employers every year, and where farm labor contractors with a fissured business model are proliferating. As a result, much more must be done to protect H-2A workers in the workplace, given that they are vulnerable due not just to the industry in which they are employed, but also because their precarious immigration status makes it difficult for them to complain when they are victimized by employers, recruiters, and FLCs.

*Wage theft is a massive problem in the major H-2B industries: Employers stole \$1.8 billion from workers since 2000*

The data discussed in the previous section are clear that the H-2B program’s size is on the cusp of reaching new heights. Why does that matter? Because at the same time, data on labor standards enforcement from DOL’s WHD paint a picture of rampant wage theft and lawbreaking by employers in the industries that employ most H-2B workers. H-2B workers are being recruited into industries where they will be vulnerable, but no new measures have been implemented yet by the Biden administration to better protect them.

WHD publishes and annually updates tables with summary data on the outcomes of WHD enforcement actions in what it calls “industries with high prevalence of H-2B workers.” The seven industries that WHD lists in these data tables include landscaping services, janitorial services, hotels and motels, forestry, food services, construction, and amusement. Data on the top H-2B occupations (from DOL labor certifications and from the USCIS H-2B Employer Data Hub) show that the vast majority of H-2B jobs that are certified by DOL and approved by USCIS are within these broad industries.<sup>66</sup>

**Table 2** lists the top H-2B occupations by number of approvals in the USCIS H-2B Employer Data Hub. The listed occupations generally correspond with the seven “high H-2B prevalence” industries listed by WHD in their data tables and accounted for 99.1% of all H-2B approvals in 2021. If we exclude occupation #8, “N/A”—which represents data observations in which the occupation field was missing—the remaining nine occupations still account for 95.7% of all H-2B approvals in 2021.<sup>67</sup>

## Table 2.

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<sup>66</sup> Office of Foreign Labor Certification, “[H-2B Temporary Non-Agricultural Program – Selected Statistics, Fiscal Year \(FY\) 2021 EOY](#),” Employment and Training Administration, U.S. Department of Labor; and USCIS, [H-2B Employer Data Hub](#), U.S. Department of Homeland Security.

<sup>67</sup> To the extent that the N/A occupations fall within the seven industries, the actual share could be as high as 99.1%.

## Nearly all H-2B workers are employed in less than 10 broad occupation groups

Top 10 H-2B occupations by number of USCIS approved petitions, fiscal year 2021

H-2B Rank	Major group SOC code	Occupation	Initial approval	Continuing approval	Total approvals	Share of total H-2B approvals
1	37	<i>Building and Grounds Cleaning and Maintenance Occupations</i>	56,388	6,960	63,348	48.0%
2	51	<i>Production Occupations</i>	13,087	2,674	15,761	11.9%
3	45	<i>Farming, Fishing, and Forestry Occupations</i>	10,692	2,057	12,749	9.7%
4	35	<i>Food Preparation and Serving Related Occupations</i>	6,744	3,262	10,006	7.6%
5	39	<i>Personal Care and Service Occupations</i>	8,785	1,149	9,934	7.5%
6	47	<i>Construction and Extraction Occupations</i>	7,270	1,052	8,322	6.3%
7	53	<i>Transportation and Material Moving Occupations</i>	4,512	576	5,088	3.9%
8	N/A	N/A	3,191	1,424	4,615	3.5%
9	49	<i>Installation, Maintenance, and Repair Occupations</i>	512	101	613	0.5%
10	27	<i>Arts, Design, Entertainment, Sports, and Media Occupations</i>	520	22	542	0.4%
<i>Totals for the top 10</i>			111,701	19,277	130,978	99.1%
<i>Totals for top 10 occupations excluding N/A</i>			108,510	17,853	126,363	95.7%
<i>Total H-2B approvals, all occupations</i>			112,546	19,555	132,101	100%

**Note:** SOC stands for Standard Occupational Classification, which is a system of job classification created by the U.S. Department of Labor, see [https://www.bls.gov/oes/current/oes\\_stru.htm#47-0000](https://www.bls.gov/oes/current/oes_stru.htm#47-0000)

**Source:** United States Citizenship and Immigration Services, U.S. Department of Homeland Security, [H-2B Employer Data Hub](#), fiscal year 2021 data file.

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The published WHD enforcement data include tables for individual fiscal years in four different categories.<sup>68</sup> The first set of tables, “All Acts,” includes data on violations of all wage and hour laws enforced by WHD in the listed industries. The second set of tables, “H-2B,” summarizes employer violations of H-2B program laws and regulations. The next set, “FLSA,” summarizes employer violations of the Fair Labor Standards Act. The final set, “All Others,”

<sup>68</sup> Wage and Hour Division, “[Industries with High Prevalence of H-2B Workers: FY2000–FY2021](#)” [data tables], U.S. Department of Labor.

summarizes violations of all laws that WHD enforces except for violations of FLSA or H-2B laws and regulations.

In the “All Acts” tables, the data fields listed by WHD in their enforcement data for the seven selected industries include:

- **Cases:** the number of cases investigated by WHD
- **Cases with violation:** the number of cases in which violations of the law were found
- **EEs (employees) employed in violation:** the number of employees involved in the cases in which violations were found
- **EE’s ATP (employees’ assessed total penalties):** the number of employees who were found to be owed back wages as a result of the identified violations
- **BW ATP (back wages assessed total penalties):** the total amount of back wages that were assessed by WHD to be owed to workers
- **CMP assessed:** the total amount of civil money penalties (CMPs) that were assessed to employers that committed violations. The assessment of CMPs is intended to deter future violations of wage and hour laws.

It is important to note that the violations and back wages owed that are detailed in these tables from WHD do not represent enforcement actions that involve only H-2B workers; they represent violations and back wages owed to *any* workers in the seven selected H-2B industries. These may include U.S. citizens, green card holders, H-2B workers, or workers of any other immigration status, including unauthorized immigrant workers.

The WHD’s “All Acts” tables provide these data for 22 fiscal years, from 2000 to 2021. **Table 3** below sums the total numbers of listed cases and employees involved, along with the total amounts of back wages owed and civil money penalties across all 22 fiscal years, adjusting the back wages owed and CMPs assessed to constant 2021 dollars.

Table 3 shows that across the 2000–2021 period, there were over 225,227 cases investigated by WHD, and violations were found in 180,451 of those cases, or 80% of cases. That means that whenever WHD initiates an investigation into an employer in these seven major H-2B industries, there is an 80% chance—a very high likelihood—that WHD will find employer violations.

**Table 3.**

## Rampant wage theft and employer lawbreaking in industries that employ H-2B workers

At least \$1.8 billion stolen from workers in industries with a high prevalence of H-2B workers, fiscal years 2000-21

Industry	Cases	Cases with violations	Employees involved in violation	Employees receiving back wages	Back wages assessed (\$2021)	Average back wages owed per employee (\$2021)	Civil monetary penalties assessed (\$2021)
<b>Total or Average</b>	225,227	180,451	1,835,805	1,666,195	1,792,259,236	1,076	114,791,387
<b>Landscaping services</b>	5,705	4,289	64,734	58,404	60,088,422	1,029	4,833,676
<b>Janitorial services</b>	11,660	9,391	105,604	96,279	96,808,594	1,006	3,289,109
<b>Hotels and motels</b>	22,469	18,501	150,452	140,864	86,691,426	615	8,430,597
<b>Forestry</b>	1,479	1,102	13,089	10,860	10,781,520	993	4,262,217
<b>Food services</b>	108,244	88,765	839,171	752,417	654,970,169	870	64,575,989
<b>Construction</b>	68,012	52,441	591,131	542,034	847,882,693	1,564	20,515,880
<b>Amusement</b>	7,658	5,962	71,624	65,337	35,036,411	536	8,883,919

**Note:** Tables include all violations of laws enforced in the selected industries by the Wage and Hour Division of the U.S. Department of Labor. Dollar amounts reported in this table have been adjusted for inflation to constant 2021 dollars using the CPI-U-RS. As a result, the dollar amounts presented here may differ from the amounts reported in the source data. Totals may not sum due to rounding.

**Source:** EPI analysis of U.S. Department of Labor, Wage and Hour Division, "Industries with High Prevalence of H-2B Workers" [data tables for fiscal years 2000-21].

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Table 3 also shows that 1.8 million workers were involved—i.e., were potential victims—in the cases that detected violations, and nearly 1.7 million of those workers were assessed by WHD to have actually been victims of wage theft—that is, their employers had failed to pay them the full wages to which they were entitled by law.

For those 1.7 million employees, WHD assessed a total of nearly \$1.8 billion in back wages that were owed to them by their employers during the 22 fiscal years from 2000 through 2021. That's nearly \$81.5 million stolen per year. Such a large dollar amount of stolen wages is

particularly shocking when considering that most of the jobs in the seven major H-2B industries are associated with very low wages.<sup>69</sup>

In addition to the column headers available in the WHD tables, Table 3 includes an additional column (vis-à-vis DOL's original tables) calculating the average back wages owed per employee who was assessed back wages. On average, each worker who was assessed back wages was owed \$1,076 by their employer. Back wages owed to workers were highest in construction, an average of over \$1,500 per worker. The second-highest amount of back wages owed per worker was in landscaping—the industry that every year accounts for nearly half of all H-2B jobs—at just over \$1,000 per worker.

In terms of civil money penalties (CMPs), the total amount of CMPs assessed during 2000–2021 was nearly \$115 million. The largest share, \$65 million (representing more than half of the total penalties), was assessed in food services. Construction accounted for nearly 18% of the CMPs assessed, at \$21.5 million. Since CMPs are assessed as a punitive measure to deter future violations, and are more likely to be assessed when a particularly egregious violation has occurred, it is reasonable to assume that the most egregious violations of wage and hour laws were occurring in food services and construction.

## [The H-2A and H-2B visa programs: Studies and reports show thousands of migrant workers have been victims of human trafficking](#)

Numerous reports published by news media outlets, researchers, advocates, and official government sources have explored the link between temporary work visa programs and human trafficking, finding that trafficking cases are common, especially among workers with H-2A and H-2B visas. This section references just a few of the major reports.

A recent report published by the nonprofit anti-trafficking organization Polaris, analyzed data collected by Polaris on their Trafficking Hotline that allows victims to call for help and information. The report, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020*, found that out of nearly 16,000 victims of human trafficking they identified through their Trafficking Hotline, more than half “were foreign nationals holding legal visas of some kind, including temporary work visas.”<sup>70</sup> More specifically Polaris describes that “there were 9,811 victims of labor trafficking who were either U.S. citizens, legal permanent residents or foreign nationals whose status in the United States was identified to the Trafficking Hotline. A full 55.2 percent of these victims were foreign nationals on visas or with legal status as asylees or refugees.”<sup>71</sup>

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<sup>69</sup> See, for example, Table 1 in Daniel Costa, “[Wages Are Still Too Low in H-2B Occupations: Updated Wage Rules Could Ensure Labor Standards Are Protected and Migrants Are Paid Fairly](#),” *Working Economics Blog* (Economic Policy Institute), March 18, 2021.

<sup>70</sup> Polaris, [Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020](#), July 2022.

<sup>71</sup> Polaris, [Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018-2020](#), July 2022.

A study on human trafficking in the United States published by the Urban Institute, a think tank, in 2014 found that the most common industries where workers were victimized were “agriculture, hospitality, domestic service in private residences, construction, and restaurants.” As noted earlier in this testimony, H-2A visas are used exclusively in agriculture, and some of the most common H-2B industries include hospitality, construction, and restaurants and the food industry. The Urban Institute also found that “The majority of victims (71 percent) entered the United States on a lawful visa,” and that “The most common temporary visas were H-2A visas...and H-2B visas.”<sup>72</sup>

The U.S. Government Accountability Office, a federal agency that “provides Congress, the heads of executive agencies, and the public with timely, fact-based, non-partisan information that can be used to improve government and save taxpayers billions of dollars,”<sup>73</sup> published a report in 2015 (which was reissued in 2017), examining in part “how well federal departments and agencies protect H-2A and H-2B workers.”<sup>74</sup> The title of report suggests what the GAO found, despite the agency’s caveats about how it was working with limited data: *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*. The GAO found that between 2009 and 2013, there were 186 H-2A and H-2B workers who were approved for T visas due to being victims of trafficking. GAO also noted that “According to [their] interviews with federal and NGO officials, the incidence of abuse may be underreported.”<sup>75</sup>

Another recent example is what has been referred to as Operation Blooming Onion in Georgia, which may have involved tens of thousands of workers, and where “24 people conspired for three years to smuggle Mexican and Central American workers and forced them to work in brutal conditions on farms located across the world, including the southern, middle and northern regions of Georgia,” which the acting U.S. Attorney for the Southern District of Georgia referred to as a case of “modern-day slavery.”<sup>76</sup> In that case, H-2A workers who were allegedly trafficked “primarily labored on onion farms, digging with their bare hands, and paid only 20 cents for each bucket. The conspirators forced the workers, despite making very little, to pay for transportation, food, and housing.” The acting U.S. attorney also noted that the case likely involved “the misuse of the H-2A-program en-masse.” Furthermore, according to the indictment:

*if a worker stepped out of line, the conspirators threatened them with guns, torture and deportation. The conspirators kept the workers in cramped, unsanitary quarters and fenced work camps with little or no food, limited plumbing and without safe water. The conspirators are accused of raping, kidnapping and threatening or attempting to kill some of the workers or their families, and in many cases, sold or traded*

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<sup>72</sup> Colleen Owens, Meredith Dank, et al., [Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States](#), Urban Institute, October 2014.

<sup>73</sup> U.S. Government Accountability Office, “[What GAO Does](#).”

<sup>74</sup> U.S. Government Accountability Office, [H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers](#), GAO-15-154, reissued May 30, 2017.

<sup>75</sup> U.S. Government Accountability Office, [H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers](#), GAO-15-154, reissued May 30, 2017.

<sup>76</sup> Drew Favakeh, “[Operation Blooming Onion: Federal indictment reveals 'modern-day-slavery' in Georgia](#),” *Savannah Morning News*, December 1, 2021.

*the workers to other conspirators As a result of workplace conditions, at least two workers died, according to the indictment.*<sup>77</sup>

The reports listed here are just a small sampling of the reports that have been made public over the years that involve temporary work visa programs,<sup>78</sup> and serve as proof that much more must be done to protect migrant workers from trafficking in the H-2A and H-2B visa programs.

## Recommended congressional Action on H-2 visas

While there is a pressing need for the Biden administration to immediately take action to reform the H-2A and H-2B visa programs, reforms that are passed by Congress and signed into law by the president would endure for longer and not be as easily reversed by a future presidential administration. This section discusses some of the key legislative reforms that would improve the H-2 visa programs, and the next section discusses needed reforms to improve all U.S. temporary work visa programs more generally.

### *Congress should improve the H-2B program by passing the Seasonal Worker Solidarity Act*

In terms of the H-2B visa program, Rep. Joaquin Castro (D-Texas) recently reintroduced legislation to reform and improve the H-2B visa. Rep. Castro's Seasonal Worker Solidarity Act (SWSA) would, among other things, require that employers pay H-2B workers no less than the local average wage for the occupation, as well as eliminate loopholes that employers use to circumvent paying fair wages in the current H-2B program, improve the process for recruitment of U.S. workers, improve and enhance enforcement of labor standards, and provide H-2B workers with a quick path to permanent residence that they control on their own.<sup>79</sup> (The SWSA would codify into statute and implement many of the key needed regulatory reforms discussed later in this testimony.) In general, the SWSA is the best and most comprehensive reform bill on H-2B visas; it would convert an abusive and dysfunctional temporary work visa program into one that is fair to all workers and provides a quick pathway to permanent residence and citizenship, allowing migrant workers to fully integrate into American life.

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<sup>77</sup> Drew Favakeh, "[Operation Blooming Onion: Federal indictment reveals 'modern-day-slavery' in Georgia](#)," *Savannah Morning News*, December 1, 2021.

<sup>78</sup> See also, for example, Liam Stack, "[Indian Guest Workers Awarded \\$14 Million](#)," *New York Times*, Feb. 18, 2015; Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, "[The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare](#)," *BuzzFeed News*, July 24, 2015; Meredith Stewart, *Culture Shock: The Exploitation of J-1 Cultural Exchange Workers*, Southern Poverty Law Center, 2013; Janie Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, Harvard Journal of Law and Gender (Vol. 36, 269-343, 2013); U.S. Department of Justice, "[Miami Beach Sex Trafficker Sentenced to 30 Years in Prison for International Trafficking Scheme Targeting Foreign University Students](#)" (press release), U.S. Attorney's Office, Southern District of Florida, March 24, 2017; Holbrook Mohr, Mitch Weiss, and Mike Baker, "[AP Impact: US Fails to Tackle Student Abuses](#)," *Associated Press*, Dec. 6, 2010; last updated Nov. 21, 2015.

<sup>79</sup> Office of Rep. Joaquin Castro, "[Congressman Castro introduces H-2B visa reform bill to strengthen protections for seasonal workers](#)," Press Release, April 22, 2022.



## *Congress should repeal and no longer pass legislative riders to expand and deregulate the H-2B program through annual appropriations bills*

Another issue facing Congress with respect to H-2B are the legislative riders included in appropriations bills that fund the U.S. government. In each year since fiscal year 2017, Congress has given the executive branch the discretionary legal authority to roughly double the number of H-2B visas available, allowing them to add up to 64,716 supplemental visas each year. This authority was provided to DHS through appropriations legislation to fund the operation of the U.S. government. Those appropriations laws included language (known as a “rider”) giving the executive branch the legal authority to expand the H-2B program during the fiscal year that the appropriations bill corresponds to. The Democrats and Republicans in the congressional appropriations committees who included and supported the language to expand H-2B failed to specify the level of increase they wanted for the H-2B program—passing the buck instead to the executive branch, by directing DHS, in consultation with DOL, to determine how many additional H-2B visas are appropriate, if any. DHS has interpreted the statute to allow it to issue up to 64,716 supplemental visas.<sup>80</sup> (In total it has been seven years since Congress first increased the size of the H-2B program through an appropriations rider. In fiscal year 2016, the first rider provided for a “returning worker” exemption—i.e., exempting H-2B workers from the cap if they were previously in H-2B status in the previous three fiscal years—rather than the discretionary authority to increase the cap by up to 64,716 that has persisted since.)<sup>81</sup>

A number of other changes to the H-2B program have been made through appropriations riders since 2015 as well, including riders to prevent DOL from enforcing key H-2B regulations that protect workers.<sup>82</sup> For example, one rider prohibited DOL from enforcing rules against worker discrimination in the H-2B program (known as the rule on corresponding employment), as well as one requiring employers to guarantee that H-2B workers would be allowed to work for at least three-fourths of the workdays promised on their job contracts (known as the three-fourths guarantee). There were also riders that prohibited DOL from conducting audits and oversight of employers to ensure they conducted the required recruitment of U.S. workers, and a rider that permitted H-2B employers to set the wage rates for H-2B workers according to wage surveys that they provide, instead of paying wage rates that are higher according to data provided by DOL (the rider on employer-provided wage surveys). Together these riders allowed H-2B employers to treat their workers unfairly and underpay them with impunity. As of fiscal year 2022, the riders on preventing DOL enforcement of the corresponding employment and three-fourths guarantee rules are

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<sup>80</sup> Andorra Bruno, [The H-2B Visa and the Statutory Cap](#), Congressional Research Service, R44306, updated February 28, 2020.

<sup>81</sup> For a more detailed explanation, see Andorra Bruno, [The H-2B Visa and the Statutory Cap](#), Congressional Research Service, R44306, updated February 28, 2020.

<sup>82</sup> Daniel Costa, “[The substance and impact of the H-2B guestworker program appropriations riders some members of Congress are trying to renew](#),” *Working Economics Blog* (Economic Policy Institute), June 17, 2016. For more background on employer-provided H-2B wage surveys and how they are used to pay H-2B workers lower wage rates, see Daniel Costa, “[H-2B crabpickers are so important to the Maryland seafood industry that they get paid \\$3 less per hour than the state or local average wage](#),” *Working Economics Blog* (Economic Policy Institute), May 26, 2017.

still in effect, as well as the rider permitting the broad use of employer-provided wage surveys to set H-2B wage rates.

This is not an ideal way to make immigration policy. The *New York Times* editorial board once alluded to this about H-2B, arguing that the program is so problematic that Congress should not expand it with budget riders,<sup>83</sup> and there have been bipartisan statements from leaders in Congress arguing that the budget riders usurp the authority of the relevant committees of jurisdiction in Congress.<sup>84</sup> Nevertheless, members of Congress have buckled to industry pressure and included the rider language in successive years. Congress should now repeal the H-2B riders, allowing DOL to enforce all worker protections in the H-2B regulations, and ending the ad hoc expansions of the H-2B cap.

*Congress should pass legislation that legalizes the undocumented farm workforce and provides access to green cards for H-2A workers, and avoid making the H-2A program available for year-round jobs through appropriations riders*

The single most meaningful piece of legislation that Congress could pass to improve conditions for all farmworkers—migrants, U.S. workers, and H-2A workers, is a broad and quick pathway to citizenship for farmworkers who are unauthorized immigrants. By immediately providing labor rights to unauthorized immigrants, a broad legalization would thereby immediately raise standards for all farmworkers and empower workers to come forward and report lawbreaking employers, which in turn will raise wages, consistent with previous legalizations.

When it comes to H-2A workers, at present, they have no viable pathway to remain permanently in the United States, despite often returning to the United States year after year—sometimes for more than a decade—to work in temporary and seasonal jobs. H-2A reform legislation should be introduced and passed that would create new green cards that would be available to H-2A workers, who should be allowed to self-petition for them after 12 months of accrued employment in H-2A status. Such legislation would honor and reward the contributions of H-2A workers and allow them and their families to become a permanent part of American society and integrate fully.

In addition, Congress should avoid making the H-2A program available for year-round agricultural jobs through appropriations riders. Similar to how riders to omnibus appropriations bills have been used to expand and deregulate the H-2B program, there have been recent proposals in Congress to allow H-2A jobs—which currently must only offer temporary or seasonal work—to become eligible for year-round agricultural occupations.

According to an analysis I published in 2019, there were just over 419,000 year-round jobs in agriculture, mostly in greenhouse and nursery production (155,000) and animal production

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<sup>83</sup> [New York Times Editorial Board, “Why Guest Workers Are Easily Exploited,” \*New York Times\*, July 1, 2016.](#)

<sup>84</sup> See, for example, Senate Committee on the Judiciary, “[Durbin, Grassley Criticize DHS Decision to Expand H-2B Visa Program Without Necessary Reforms](#),” Press Release, March 31, 2022, and Senators Chuck Grassley and Dianne Feinstein, “[Grassley, Feinstein: Process To Change H-2B Program Lacked Transparency](#),” Press Release, May 1, 2017.

and aquaculture (264,000).<sup>85</sup> Farm employers have been clamoring for years for Congress to allow them to hire temporary H-2A workers for many of these 419,000 permanent, year-round jobs, especially on dairies. Since they haven't had the requisite support to pass legislation that would accomplish this, members of Congress have attempted [multiple times](#) to circumvent the regular legislative process by pushing to make the change through legislative riders on annual omnibus appropriations bills.<sup>86</sup>

However, using a problematic temporary work visa program where workers are [virtually indentured](#) to their employers in order to fill permanent, year-round jobs should give pause to all members of Congress—it makes no sense, unless the goal is to keep workers employed in permanent jobs from having equal rights and fair pay. If migrant workers are filling true labor shortages in permanent, year-round jobs, then those workers should always get permanent immigrant visas that put them on a path to citizenship.

## Recommendations for reforming temporary work visa programs more broadly

The bargaining power of workers is undercut when more than 2 million temporary migrant workers—1.2% of the U.S. labor force—are underpaid by employers and cannot safely complain to DOL or sue employers that exploit them because their visa status is owned and controlled by their employer. To remedy this, a number of key reforms have been proposed and should be considered, both to protect workers and also to modernize the U.S. system for labor migration writ large. These reforms would help develop a strong evidence base for migration policymaking that is nimble enough to respond to the demands of a modern economy with needs that are constantly changing.

While many key improvements to temporary work visa programs including H-2A and H-2B can be accomplished by the executive branch through regulations—most notably by ensuring that migrant workers are paid fairly by improving prevailing wage rules in some visa programs and creating new wage rules in the programs that lack them—the reality remains that the most transformative and lasting solutions will require congressional action. An added benefit of these more durable solutions is that they will set a useful baseline of protections for temporary migrant workers, both in normal times and during emergencies like pandemics, and during both periods of high unemployment and tight labor markets. In addition, improving labor standards for temporary migrant workers will lift the floor for all workers, which will increase bargaining power and raise wages, including during times of high unemployment.

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<sup>85</sup> Daniel Costa, "[The Farm Workforce Modernization Act allows employers to hire migrant farmworkers with H-2A temporary visas for year-round jobs: Impacts are unknown and other wage-setting formulas should be considered](#)," *Working Economics* blog (Economic Policy Institute).

<sup>86</sup> See for example, Congresswoman Lucille Roybal-Allard, "[Appropriations Committee Approves Fiscal Year 2020 Homeland Security Funding Bill](#)," Press Release, June 11, 2019.

Congress should reform temporary work visa programs by passing laws to update, simplify, and standardize the rules for all of them, in ways that make them consistent with basic human and labor rights. The following sections briefly discuss the key reforms that are necessary.

### *Congress should regulate foreign labor recruiters to protect migrant workers*

Congress could begin its reforms by requiring employers to recruit and offer jobs to qualified U.S. workers before being allowed to recruit workers abroad, ensuring transparency in the recruitment process abroad for potential migrant workers who may participate in visa programs, and requiring that employers be held accountable for the actions of labor recruiters abroad.

There is at least one example of legislation that could serve as a starting point for achieving the reforms necessary to ensure transparency and accountability in recruitment for migrants who are abroad, although it would need to be improved upon. The comprehensive immigration reform legislation that passed the Senate in 2013 contained a section on foreign labor recruitment, which, if it had become law, would have created a new program requiring foreign labor contractors who recruit migrant workers to register with DOL and to disclose certain information about recruited workers, employers, subcontractors, and job terms, and to post a bond.<sup>87</sup> The provisions would have also prohibited discriminating or retaliating against workers, banned the charging of recruitment fees to workers, and implemented a new complaint and investigation process along with administrative fines and a private right of action, allowing either the government or an aggrieved person to bring a civil action to enforce the rights of migrant workers.

### *Congress should require that all temporary migrant workers are paid fairly according to U.S. wage standards*

And next, in cases where employers hire migrant workers after proving they were unable to recruit U.S. workers at prevailing wages—in order to preserve U.S. wage standards and ensure that temporary migrant workers are paid a fair wage that is commensurate with the value of their labor—the law should require that all workers with temporary visas are paid no less than the local average or median wage for their job.

There are some key legislative proposals that would achieve this for particular visa programs. In terms of jobs that require at least a college degree, the H-1B and L-1 Visa Reform Act, a bipartisan proposal originally introduced by Sens. Richard Durbin (D-Ill.) and Chuck Grassley (R-Iowa), would reform the H-1B program by requiring employers to first recruit U.S. workers for open positions, and then require employers to pay H-1B workers at least the local median wage, and would provide DOL with additional authority to ensure compliance with the

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<sup>87</sup> See [Subtitle F—Prevention of Trafficking in Persons and Abuses Involving Workers Recruited Abroad](#), in [Border Security, Economic Opportunity, and Immigration Modernization Act](#), S. 744, 113th Cong. (2013). For a summary of the provisions, see Daniel Costa, [Future Flows and Worker Rights in S. 744: A Guide to How the Senate Immigration Bill Would Modify Current Law](#), Economic Policy Institute, November 2013.

program.<sup>88</sup> Employers would also be required to pay temporary migrant workers with L-1 visas the local median wage (the L-1 visa program currently has no wage rule). The bill is co-sponsored by Democratic Sens. Richard Blumenthal of Connecticut, Sherrod Brown of Ohio, and Bernie Sanders of Vermont, and a bipartisan version has been introduced in the House of Representatives, co-sponsored by Democratic Reps. Bill Pascrell of New Jersey and Ro Khanna of California.<sup>89</sup>

Another piece of legislation, proposed by Sens. Durbin, Blumenthal, and Amy Klobuchar (D-Minn.) and former Senator (now Vice President) Kamala Harris, would facilitate the fair recruitment of recent foreign graduates of U.S. universities with degrees in the science, technology, engineering, and math (STEM) fields. The Keep STEM Talent Act would allow STEM graduates to obtain green cards—and bypass years of being indentured on temporary visas—if employers simply go through the DOL labor certification process and offer to pay the fair market wage.<sup>90</sup>

In terms of the H-2B visa program, Rep. Joaquin Castro’s aforementioned Seasonal Worker Solidarity Act (SWSA) would, among other things, require that employers pay H-2B workers no less than the local average wage for the occupation, as well as eliminate loopholes that employers use to circumvent paying fair wages in the current H-2B program.<sup>91</sup>

*Congress should prohibit temporary migrant workers from being indentured to their employers through their visa status and allow workers to self-petition for permanent residence*

Another priority for Congress would be to pass a law firmly establishing that temporary migrant workers will no longer be tied and indentured to their employers through their visa status. Congress should also limit the time that temporary migrant workers are in a temporary/nonimmigrant status by allowing them to self-petition for permanent residence after a short provisional period,<sup>92</sup> but preferably no longer than 18 months. The aforementioned Seasonal Worker Solidarity Act, for example, would allow H-2B workers to change employers and to self-petition for permanent residence after accruing 18 months of work in H-2B status.

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<sup>88</sup> [H-1B and L-1 Visa Reform Act of 2020](#), S. 3370, 116th Cong. (2020). See also Rep. Bill Pascrell, “[Pascrell, Grassley, Durbin, Gosar, Khanna, Pallone, Gooden Lead Overhaul to H1-B, L-1 Visa Programs: Bipartisan, Bicameral Reforms Will Protect American Workers and Improve Fairness for Skilled Labor Applicants](#)” (press release), May 22, 2020.

<sup>89</sup> [H-1B and L-1 Visa Reform Act of 2020](#), H.R. 6993, 116th Cong. (2020).

<sup>90</sup> Sen. Richard Durbin, “[Durbin, Blumenthal, Harris, Klobuchar: Keep International Student Talent in America: The Keep STEM Talent Act Would Retain International Graduates with Advanced STEM Degrees](#)” (press release), June 6, 2019.

<sup>91</sup> Office of Rep. Joaquin Castro, “[Congressman Castro introduces H-2B visa reform bill to strengthen protections for seasonal workers](#),” Press Release, April 22, 2022.

<sup>92</sup> See, for example, Demetrios G. Papademetriou et al., [Aligning Temporary Immigration Visas with U.S. Labor Market Needs: The Case for a New System of Provisional Visas](#), Migration Policy Institute, July 2009.

*Congress should appropriate more funding to enforce labor standards and bar employers from hiring through visa programs if they violate labor and employment laws*

Because of how perpetually underfunded it has been, Congress should appropriate much more funding to DOL to enforce this updated work visa system<sup>93</sup> and strengthen the department's mandates to conduct adequate oversight, including random audits of employers, and pass laws permanently banning any employer from hiring through temporary work visa programs if that employer has violated labor and employment laws. Investigative news reports have revealed that even when DOL sanctions an employer for labor violations committed against temporary migrant workers, the employers are often required to pay only nominal fines and are allowed to continue hiring new workers through visa programs.<sup>94</sup>

*Congress should pass the POWER Act to protect workers of all immigration statuses from the threat of employer retaliation and deportation*

Congress should also prioritize reintroduction and passage of the Protect Our Workers from Exploitation and Retaliation (POWER) Act, perhaps the single most important piece of legislation aimed at protecting workers of all immigration statuses from the threat of employer retaliation and deportation. The POWER Act was last introduced in 2019 by Rep. Judy Chu (D-Calif.) and Sen. Robert Menendez (D-N.J.) and is supported by various unions and migrant worker advocacy organizations. The POWER Act would expand access to humanitarian "U" visas for migrant workers who report workplace violations (U visas are currently available to victims of certain qualifying crimes who are cooperating in a related investigation or prosecution),<sup>95</sup> increase the number of U visas available, and extend eligibility to more labor-related crimes.

The POWER Act would also strengthen the investigative powers of labor standards enforcement agencies. And it would permit postponing the deportation of migrant workers who file a bona fide workplace claim or are a material witness to one, so they can remain in the country to pursue the claim; they would also be eligible for employment authorization so they can work during that time.

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<sup>93</sup> Daniel Costa, "[Immigration Enforcement Is Funded at a Much Higher Rate Than Labor Standards Enforcement—and the Gap Is Widening](#)," *Working Economics Blog* (Economic Policy Institute), June 20, 2019; Inna Mangundayao, Celine McNicholas, and Margaret Poydock, "[Worker protection agencies need more funding to enforce labor laws and protect workers](#)," *Working Economics blog* (Economic Policy Institute), July 29, 2021.

<sup>94</sup> Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, "[Employers Abuse Foreign Workers. U.S. Says, by All Means, Hire More](#)," *BuzzFeed News*, May 12, 2016.

<sup>95</sup> National Immigration Law Center, "[The POWER Act: Protect Our Workers from Exploitation and Retaliation Act](#)," last updated November 2019.

### *Congress should improve transparency in temporary work visa programs to protect workers and aid anti-trafficking efforts*

While the reforms discussed in the preceding sections would go a long way toward protecting temporary migrant workers, other systemic reforms are also urgently needed to more broadly protect labor standards and modernize the immigration system.

For example, there should be much more transparency in the system. Too little is known about how temporary work visa programs are being used, in part because data on visas are collected on paper forms and applications rather than electronically,<sup>96</sup> and even most of the digitized information collected is not made public or requires lengthy and costly Freedom of Information Act requests to obtain. Migrant worker advocates have pressed for years for more and better government data and transparency in work visa programs to ensure that migrants are being paid fairly, and that the immigration system is not being co-opted in ways that allow employers to discriminate and segregate the workforce. More data would also serve as a tool that could aid the organizations and advocates who are fighting human trafficking.<sup>97</sup> Bipartisan legislation has been introduced to achieve this, most recently the Visa Transparency Anti-Trafficking Act,<sup>98</sup> but opposition by employers has caused it to stall.

### *Congress should create an independent commission on employment-based migration to make the system more flexible and data-driven and depoliticize the adjustment of numerical limits*

Last but not least, temporary work visa programs and the U.S. labor migration system writ large must be reformed to be more flexible and data-driven. For example, most numerical limits (i.e., quotas or caps) for permanent and temporary work visas were set by law in 1990 and have not been changed since, despite vast fluctuations in economic conditions. A more rational system would have annual caps that adjust to changing conditions—increasing when necessary to alleviate proven labor shortages and decreasing during economic slowdowns and recessions.

The best proposal to do this is through the creation of an independent, permanent commission on employment-based migration, which would be a high-level body staffed by expert researchers with integrity and technical competence, and who are tasked with studying immigration and the labor market and providing timely and reliable data and analysis to policymakers and the public. The commission could work to develop much better measures of labor market shortages, assessment methodologies, and processes to efficiently

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<sup>96</sup> See discussion of truckloads of paper applications for temporary work visas arriving at USCIS, in Miriam Jordan, “[Visa Applications Pour in by Truckload Before Door Slams Shut](#),” *New York Times*, April 3, 2017.

<sup>97</sup> See, for example, Jeremy McLean, *The Case for Transparency: Using Data to Combat Human Trafficking Under Temporary Foreign Worker Visas*, Justice in Motion, September 2020.

<sup>98</sup> Rep. Lois Frankel, “[Frankel, Deutch, Blumenthal, & Cruz Introduce Bipartisan, Bicameral Bill to Bring Transparency to Temporary Worker Visa Programs & Combat Human Trafficking](#)” (press release), July 23, 2019; [Visa Transparency Anti-Trafficking Act of 2019](#), H.R. 3881, 116th Cong. (2019); [Visa Transparency Anti-Trafficking Act of 2019](#), S. 2224, 116th Cong. (2019).

adjust migrant worker flows to match employers' needs while protecting U.S. labor standards.<sup>99</sup>

Adjusting annual visa caps requires congressional action, which can be contentious, influenced by lobbying and opaque political considerations rather than facts, and too slow to keep up with changing economic conditions. A commission would report regularly to Congress and the president, proposing new quotas on an annual or semi-annual basis, and issue public reports citing the evidence for its recommendations, which would be based on methodologies that are credible and transparent. The commission would consider the many trade-offs inherent in immigration policymaking in its recommendations, and Congress would ultimately decide which policies to adopt or reject. But basing quotas on evidence and data would have the effect of depoliticizing the process of setting numbers and provide an evidence base for decisions that can be inspected by all.

Models for such a commission already exist, both in the United States and abroad. In the United States, for example, it would be difficult to imagine Congress making decisions about trade policy without the advice of the International Trade Commission. Both immigration and trade are vital to the U.S. economy, but Congress cannot be expected to have the relevant expertise to make fully informed decisions about either. In the United Kingdom, the Migration Advisory Committee (MAC) is an independent governmental body that studies labor shortages and makes recommendations to Parliament about when to facilitate more migration and for which occupations. The MAC is staffed with notable economists and labor market experts who study what they call “top-down” labor market indicators, such as growth in wages, employment, and unemployment, and job vacancy data, but MAC staff also interview both employers and unions to get a sense of what’s happening on the ground—what the MAC calls “bottom-up” indicators—which serve to better inform the MAC when crafting its recommendations.<sup>100</sup>

A number of bipartisan groups and research institutes have called for an independent commission on employment-based migration or some version of it, including The Independent Task Force on Immigration and America’s Future (co-chaired by Lee Hamilton and Spencer Abraham), the Council on Foreign Relations’ Independent Task Force on U.S. Immigration Policy (co-chaired by Jeb Bush and Thomas McLarty III), the Brookings-Duke Immigration Policy Roundtable, the Brookings Institution, the Economic Policy Institute, and the Migration Policy Institute. Versions of a commission have been introduced multiple times in proposed legislation<sup>101</sup> and should be considered again, either as a standalone proposal or as an integral component of a comprehensive immigration reform package.

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<sup>99</sup> See, for example, Ray Marshall and Ross Eisenbrey, “[Commission Needed to Solve Immigration](#),” *The Hill*, June 10, 2010.

<sup>100</sup> See, for example, Martin Ruhs and Philip Martin, “On Migration, the US Should Copy the UK,” *Financial Times*, Feb. 18, 2013; Daniel Costa and Philip Martin, [Temporary Labor Migration Programs: Governance, Migrant Worker Rights, and Recommendations for the U.N. Global Compact for Migration](#), Economic Policy Institute, Aug. 1, 2018.

<sup>101</sup> See, for example, legislation coauthored and introduced by former Reps. Solomon Ortiz (D-Texas) and Luis Guterrez (D-Ill.), which had 103 total cosponsors. See Section 501 in the [Comprehensive Immigration Reform for America’s Security and Prosperity Act of 2009](#) (CIR ASAP), H.R. 4321, 111th Cong. (2009). CIR ASAP was later reintroduced in 2013 by Reps. Raul Grijalva (D-Ariz.) and Filemon Vela, Jr. (D-Texas), as the [CIR ASAP Act of 2013](#), H.R. 3163, 113th Cong. (2013).



## Recommended regulatory and executive actions for reforming the H-2B visa program

Finally, while more durable congressional reforms are preferable, there are nevertheless a number of actions that the Biden administration can and should take immediately to reform the H-2B program in order to better protect workers, many of which have been proposed by migrant worker advocates in the past. Below is a list and discussion of some of the reforms that would be the most meaningful and improve outcomes in the H-2B program. These executive reforms would ensure that H-2B workers are paid fairly and have the freedom to come forward to report abuses by employers, and they would also help prevent employers with records of violating labor and employment laws from hiring through the H-2B program.

*The Biden administration should improve the SeasonalJobs.gov platform and establish a complaint mechanism so that U.S. workers are not overlooked for seasonal jobs*

Although the H-2B provisions in the Immigration and Nationality Act state that H-2B workers must be “coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country”<sup>102</sup>—meaning at the national, and not just local level—the reality is that for years, program rules have not ensured that unemployed workers in the United States have a fair and first shot at H-2B jobs. This was documented and explained in a December 2015 news report, which found that in the H-2B and H-2A programs:

*[C]ompanies across the country in a variety of industries have made it all but impossible for U.S. workers to learn about job openings that they are supposed to be given first crack at. When workers do find out, they are discouraged from applying. And if, against all odds, Americans actually get hired, they often are treated worse and paid less than foreign workers doing the same job, in order to drive the Americans to quit.<sup>103</sup>*

The April 2015 H-2B regulations promulgated by the Obama administration were an attempt by the administration to remedy many of the deficiencies in terms of recruitment, and the Trump administration modified the H-2B recruitment process to one that is entirely conducted online, via the SeasonalJobs.gov website.<sup>104</sup>

While moving H-2B recruitment exclusively online has ostensibly taken recruitment to the national level, the reality is that little is done by DOL to ensure that employers have adequately tested the U.S. labor market for available workers or hired U.S.-based applicants for the job opportunities they advertise. A prime example is the Trump Organization’s

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<sup>102</sup> 8 USC §1101(a)(15)(H)(ii)(b)

<sup>103</sup> Jessica Garrison, Ken Bensinger, and Jeremy Singer-Vine, “[All You Americans Are Fired](#),” *BuzzFeed News*, December 1, 2015.

<sup>104</sup> Department of Homeland Security and the Employment and Training Administration of the U.S. Department of Labor, [Modernizing Recruitment Requirements for the Temporary Employment of H-2B Foreign Workers in the United States](#), 84 Fed. Reg. 62431 (November 15, 2019).

practices which were reported on by both the *New York Times* and *Washington Post*.<sup>105</sup> In 2016, the *New York Times* report detailed the hiring practices at Trump’s Mar-a-Lago resort:

*Since 2010, nearly 300 United States residents have applied or been referred for jobs as waiters, waitresses, cooks and housekeepers there. But according to federal records, only 17 have been hired.*

*In all but a handful of cases, Mar-a-Lago sought to fill the jobs with hundreds of foreign guest workers from Romania and other countries.*

When asked why so many of the U.S.-based applicants were not hired for open positions, then-presidential candidate Donald Trump responded that “The only reason they wouldn’t get a callback is that they weren’t qualified, for some reason. There are very few qualified people during the high season in the area.”<sup>106</sup>

As this example shows, U.S. employers can entirely bypass the U.S. workforce by claiming that U.S.-based applicants are unqualified—for what are usually jobs requiring few skills or experience—and there is no formal complaint mechanism for U.S. workers to complain to DOL that they have been overlooked for jobs that have been posted.

To remedy these issues, DOL should improve the SeasonalJobs.gov website so that it is more user-friendly and up to date, and establish a complaint mechanism so that U.S. workers can notify DOL when they are not hired for positions they applied for that were posted on the SeasonalJobs.gov. In addition, DOL should conduct random audits of employers to determine whether they have hired U.S.-based applicants. DOL should also establish a formal channel to receive input from advocates and unions about jobs posted on SeasonalJobs.gov, for instance in cases where wage rates may seem inconsistent with local labor market realities, or where large numbers of U.S. workers are unemployed and seeking seasonal positions.

### *DOL should not approve H-2B labor certifications for jobs in industries with high unemployment rates*

As noted above, the recruitment requirements for H-2B remain minimal, enforcement is lax, and therefore employers can still easily game the system with impunity. That’s likely part of the explanation for how, in early 2021—despite the fact that unemployment in many of the top H-2B industries at the time ranged from roughly 10% to 17%—DOL certified many more H-2B jobs than the number of visas available under the annual cap.<sup>107</sup> While the Office of Foreign Labor Certification (OFLC), which approves or rejects applications for H-2B labor certifications, looks at H-2B certifications on a case by case basis, it should instead consider

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<sup>105</sup> Charles V. Bagli and Megan Twohey, “[Donald Trump to Foreign Workers for Florida Club: You’re Hired](#),” *NY Times*, February 25, 2016; David A. Farenthold and Lori Rozsa, “[Apply by fax’: Before it can hire foreign workers, Trump’s Mar-a-Lago Club advertises at home — briefly](#),” *Washington Post*, August 7, 2017.

<sup>106</sup> Charles V. Bagli and Megan Twohey, “[Donald Trump to Foreign Workers for Florida Club: You’re Hired](#),” *NY Times*, February 25, 2016.

<sup>107</sup> See discussion in Daniel Costa, “[Claims of labor shortages in H-2B industries don’t hold up to scrutiny](#),” *Working Economics* (Economic Policy Institute blog), March 9, 2021.

broader labor market realities when assessing applications, given the national scope of the H-2B program, and the fact that unemployment in H-2B industries is often higher than the national unemployment rate. If for example, the national unemployment rate in the construction industry is at 12%, OFLC should view applications for H-2B jobs in construction with heightened scrutiny, and either reject them or require further proof from employers that they have adequately conducted a national search for U.S. workers. In order to implement this, OFLC should develop objective metrics with which to assess labor market realities in H-2B industries.

### *New rules and a screening procedure are needed to prevent lawbreaking employers from hiring through the H-2B program*

In addition to the systemic flaws in the H-2B program, the enforcement data from the Wage and Hour Division (WHD) prove that H-2B workers are being employed in industries where millions of workers have been robbed regularly by employers. But at present, no laws or regulations prevent employers from hiring through the H-2B program if they have been found to have committed any labor, wage and hour, civil rights, or anti-discrimination laws. Employers can be barred by DOL from the H-2B program for violating H-2B laws or regulations, but such examples are rare, and some repeat violators continue to be able to hire through H-2B.<sup>108</sup>

Due to the high prevalence of wage and hour violations in major H-2B industries, there is a strong case for DOL to begin screening employers through the H-2B application process to identify and prohibit those that have violated labor and wage and hour laws from hiring H-2B workers. Given the present and likely future reality that WHD will continue to be vastly underfunded and understaffed,<sup>109</sup> such a screening process on the front end of the H-2B application process could act as a useful and efficient tool to prevent cycles of abuse without WHD having to go through a lengthy and costly investigation on the back end, after workers have arrived in the United States and been robbed or otherwise exploited. This would also benefit employers with clean records by allowing them to hire more workers under the H-2B cap.

One possible model that could be adapted is currently operated by USCIS, namely, their Electronic Registration Process for employers hiring through another visa program, H-1B. USCIS describes the H-1B Electronic Registration Process as a system whereby employers “and their authorized representatives, who are seeking to employ H-1B workers subject to the cap, complete a registration process that requires only basic information about the prospective petitioner and each requested worker.”<sup>110</sup> After that, USCIS takes the “properly

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<sup>108</sup> See, for example, Ken Bensinger, Jessica Garrison, and Jeremy Singer-Vine, “[The Pushovers: Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More.](#)” *Buzzfeed News*, May 12, 2016.

<sup>109</sup> See for example, Ihna Mangundayao, Celine McNicholas, and Margaret Poydock, “[Worker protection agencies need more funding to enforce labor laws and protect workers.](#)” *Working Economics* blog (Economic Policy Institute), July 29, 2021; and section on WHD funding and enforcement in Daniel Costa, Philip Martin, and Zachariah Rutledge, “[Federal labor standards enforcement in agriculture: Data reveal the biggest violators and raise new questions about how to improve and target efforts to protect farmworkers.](#)” Economic Policy Institute, December 15, 2020.

<sup>110</sup> USCIS, “[H-1B Electronic Registration Process.](#)” U.S. Department of Homeland Security.

submitted electronic registrations” and “[o]nly those with selected registrations will be eligible to file H-1B cap-subject petitions.”<sup>111</sup>

While the H-1B Electronic Registration Process is mainly designed to streamline processes for employers, the model could be adapted by DOL as part of the application process at the labor certification stage. For example, DOL could set up a preregistration process in which employers list basic information about their business and the purported need for H-2B workers (as is already done via the DOL labor certification attestation forms). As part of that new process, employers could be required to attest, under penalty of perjury and of being banned from hiring through H-2B, that they have not been found to have violated any labor, wage and hour, civil rights, or anti-discrimination laws during the past five years. DOL could then attempt to verify by cross-referencing enforcement data and other relevant records, and ultimately certify employers that have not been found to have violated the applicable laws. Employers that are certified by DOL could then continue on with the labor certification process.<sup>112</sup>

### *Employers should be required to pay housing and transportation costs for U.S. workers who apply for seasonal jobs*

One major difference between the H-2A and H-2B visa programs is that while employers are required to provide for all costs related to transportation and housing for H-2A workers, they are not required to do the same for H-2B workers. In the H-2B program, employers are only required to pay for transportation to and from the worker’s country of origin into the United States, and back, after the job has ended. In the H-2A program, employers also either provide transportation to workers or pay for daily transportation costs to and from the worksite. U.S. workers who are employed by employers with H-2A workers also are entitled to housing and transportation costs if they are working in similar jobs for the same employer.

The H-2B statute’s national standard for the protection of U.S. labor standards means employers *should be* required to recruit nationwide for available U.S. workers and offer to pay for housing and transportation for both U.S. and H-2B workers willing to do the job; however it does not. For example, if someone from Puerto Rico—a region with high unemployment—wants to work at a resort on Mackinac Island in Michigan, which has a small labor pool, or someone from Fresno, California, wants to work in a donut shop at the Outer Banks in North Carolina, employers should have to offer them free housing and transportation before being allowed to hire an H-2B worker. Otherwise, employers have not effectively recruited nationwide. Under the current H-2B rules—where employers do not have to offer to pay for transportation and housing—the absurd result is that employers are able to recruit workers from abroad through the H-2B program, even during times of high unemployment in major H-2B industries, despite the program being intended for use only when a labor shortage exists.

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<sup>111</sup> USCIS, “[H-1B Electronic Registration Process](#),” U.S. Department of Homeland Security.

<sup>112</sup> This process could also take place at the USCIS petition stage like the H-1B Electronic Registration Process, but that would cause DOL to certify H-2B jobs that would not be able to be filled if employers were later prohibited from filing H-2B petitions, and DOL likely has access to the relevant enforcement data for verifying employer attestations, making DOL the ideal agency to conduct the registration process.

Thus, H-2B rules should be amended to require that these housing and transportation costs be covered by employers. Such a rule change would lead to the H-2B recruitment requirements becoming a truly national search that allows U.S. workers to access H-2B jobs anywhere in the United States.

*H-2B wage regulations should require employers to pay the highest of the local, state, or national average wage for the occupation and eliminate the use of employer-provided wage surveys for setting H-2B wage rates*

The H-2B visa program has a prevailing wage rule that exists for the purpose of establishing a minimum, legally required wage that jobs must be advertised at in the United States when recruiting U.S. workers—a requirement that must be fulfilled before employers can access the H-2B program—in order to determine if a labor shortage exists. The purpose of the H-2B prevailing wage requirement is also to safeguard U.S. wage standards in H-2B occupations and protect migrant workers from being legally underpaid according to U.S. wage standards.

In most cases, since 2015, the DOL’s H-2B wage methodology<sup>113</sup> has required that employers advertise H-2B jobs to U.S. workers at the local average wage for the specific occupation and pay their H-2B employees that wage—according to data from the DOL’s Occupational Employment and Wage Statistics (OEWS) survey. While at first glance this appears to be a reasonable wage rule, in practice, the available evidence makes clear that the H-2B wage rule is undercutting wage standards at the national level in H-2B occupations and is therefore not consistent with the law establishing the H-2B program.

To illustrate, see **Table 4** below, which shows the top 15 H-2B occupations in fiscal year 2019 by Standard Occupational Classification code, according to the number of H-2B jobs certified by DOL. For context, the top 15 H-2B occupations accounted for 84% of all certified H-2B jobs in 2019. The column to the right of the number of certified jobs is the nationwide average hourly wage for all certified H-2B workers in each of the occupations, according to DOL disclosure data. To the right of that are the 2019 average hourly wage rates for all workers in the occupation nationwide, according to DOL’s OEWS survey, which is used to set H-2B wage rates, making it an apples-to-apples comparison (2019 data were used for H-2B and OES because more recent data are not as easily comparable due to changes in data reporting). The final two columns show the difference between the average hourly certified H-2B wage and the average hourly OEWS wage for all workers in the entire country—the dollar amount and in percentage terms. In other words, these numbers reveal the amounts by which certified H-2B wages are undercutting national-level wage standards in H-2B occupations.

Table 4 clearly shows that the H-2B program is allowing employers to legally undercut U.S. wage standards.

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<sup>113</sup> Department of Homeland Security and the Employment and Training Administration of the U.S. Department of Labor, [Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program](#), Final Rule, 80 Fed. Reg. 24145 (April 29, 2015).

**Table 4.****Average certified wages for H-2B jobs are still too low**

2019 national average certified H-2B wage, average OES wage, and dollar amount and percent below OES wage for the top 15 H-2B occupations

H-2B Rank	SOC Code	Occupation	H-2B jobs certified	H-2B average hourly wage	OES national average hourly wage	Amount below national average hourly wage	Percent below average hourly wage
1	37-3011	Landscaping and Groundskeeping Workers	66,151	\$14.18	\$15.75	\$1.57	11.1%
2	45-4011	Forest and Conservation Workers	11,283	\$12.34	\$15.96	\$3.61	29.3%
3	37-2012	Maids and Housekeeping Cleaners	9,869	\$11.78	\$13.05	\$1.27	10.8%
4	51-3022	Meat, Poultry, and Fish Cutters and Trimmers	8,486	\$10.98	\$14.02	\$3.04	27.7%
5	39-3091	Amusement and Recreation Attendants	8,014	\$9.62	\$11.85	\$2.23	23.2%
6	35-3031	Waiters and Waitresses	4,104	\$13.11	\$13.04	-\$0.07	-0.5%
7	47-2061	Construction Laborers	3,369	\$16.18	\$20.31	\$4.13	25.5%
8	35-2014	Cooks, Restaurant	3,299	\$13.62	\$13.97	\$0.35	2.6%
9	53-7062	Laborers and Freight, Stock, and Material Movers, Hand	2,274	\$13.26	\$15.64	\$2.38	17.9%
10	35-3023	Fast Food and Counter Workers	2,255	\$10.46	\$11.32	\$0.86	8.2%
11	39-2021	Animal Caretakers	2,226	\$12.58	\$13.17	\$0.60	4.7%
12	51-9198	Helpers—Production Workers	1,728	\$12.78	\$14.86	\$2.08	16.3%
13	47-2051	Cement Masons and Concrete Finishers	1,610	\$15.48	\$23.53	\$8.05	52.0%
14	35-9011	Dining Room and Cafeteria Attendants and Bartender Helpers	1,238	\$11.12	\$12.18	\$1.06	9.5%
15	35-9021	Dishwashers	1,184	\$11.24	\$11.89	\$0.64	5.7%
Total jobs certified in top 15 H-2B occupations in 2019			127,090				

**Note:** H-2B and OES wage data are adjusted to 2020 dollars. H-2B wage data are the weighted average hourly wage of all workers in a respective occupation. H-2B wage data on Fast Food and Counter Workers (SOC code 35-3023) are the combined wage data of Combined Food Preparation and Serving Workers, Including Fast Food (SOC code 35-3021) and Counter Attendants, Cafeteria, Food Concession, and Coffee Shop workers (SOC code 35-3022). A negative value in the amount or percent below national average hourly wage columns represents an H-2B job that was, on average, certified at a higher wage rate than the corresponding OES national average hourly wage (there is only one instance of this, in the Waiters and Waitresses occupation).

**Source:** EPI analysis of the Bureau of Labor Statistics' 2019 Occupational Employment Statistics, and of H-2B 2019 fiscal year disclosure data from the [Office of Foreign Labor Certification's Performance Data](#)

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While, as noted above, H-2B wages are set at the local level according to each job, we must instead look at the impact of the H-2B program on the average wages of H-2B occupations at the national level, because the H-2B statute sets a *national* standard for the protection of U.S. labor standards. The H-2B statute clearly states that H-2B workers can be hired only “if unemployed persons capable of performing such service or labor cannot be found in this country.”<sup>114</sup> In order to determine whether there are “unemployed persons” in the United States capable of doing a job before an employer can hire an H-2B worker, employers *should* be required to offer at least the local, state, or national average wage for the occupation (whichever is higher), recruit U.S. workers nationwide, and offer to pay for housing and transportation for both U.S. and H-2B workers. But under the H-2B recruitment and wage regulations, that’s never actually been the case.

Table 4 shows that in all but one of the top 15 H-2B occupations in fiscal 2019, the average hourly wage certified nationwide for H-2B workers was lower than the OEWS average hourly wage for all workers in the occupation. The biggest wage differential was found in the cement masons and concrete finishers occupation: The national average hourly wage was just over \$8.00 higher than the average wage certified for H-2B workers. The next biggest difference was in the construction laborers occupation, where the national average wage was just over \$4.00 higher than the average wage certified for H-2B workers. If, for example, an employer hired an H-2B construction worker to work for 40 hours per week for 36 weeks (approximately nine months) at \$4.00 per hour less than the national average wage—due to local wage variations, as the H-2B wage rule allows—the employer would save, and an H-2B worker would be underpaid by, \$5,760.

In the top two occupations of landscaping and groundskeeping workers and forest and conservation workers—which combined accounted for over half (51.5%) of all H-2B certified jobs in 2019—the average H-2B wage was \$1.57 and \$3.61 lower per hour than the national average wage, respectively. Employers in the seafood industry, who every year are the loudest voices calling for an increase in the H-2B cap, collectively paid their H-2B workers \$3.04 less per hour than the national average wage in the meat, poultry, and fish cutters and trimmers occupation.

An easy way to fix this so that the H-2B wage rule no longer undercuts existing U.S. wage standards and so that it is consistent with the statute that establishes the program would be to require that employers pay at least the highest of the local, state, or national average wage for the occupation according to DOL’s OEWS data. DOL could even require a higher wage—for example, the 75th-percentile wage instead of the average—in order to incentivize additional recruitment of U.S. workers. The Biden DOL has the legal authority to make these changes—and given the popularity of the H-2B program among employers, even during times of high unemployment,<sup>115</sup> they should consider doing it quickly in order to protect wage standards in H-2B occupations and ensure that migrant workers in H-2B are not exploited as a lower-cost alternative to hiring unemployed U.S. workers.

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<sup>114</sup> 8 USC §1101(a)(15)(H)(ii)(b)

<sup>115</sup> Daniel Costa, “[Claims of labor shortages in H-2B industries don’t hold up to scrutiny: President Biden should not expand a flawed temporary work visa program](#),” Working Economics (Economic Policy Institute blog), March 9, 2021.

There's an additional element of the current H-2B wage rule that allows employers to undercut wage standards in H-2B: employer-provided private wage surveys. Employers have the ability, under the current rules, to cherry-pick the data source they like in order to establish the legal minimum wage rates for their H-2B employees through nongovernmental wage surveys that DOL approves. This element of the H-2B wage rule—using private wage surveys to set wage rates—has been the subject of recent litigation by advocates on behalf of seafood workers.<sup>116</sup> One can rightly assume that employers never go through the trouble of using one of these private wage surveys to increase the minimum wage they'll pay their H-2B workers—they only use them to lower it. I've written about one example where the employer was highlighted by the local Washington DC news station, WAMU.<sup>117</sup> In that example, seafood employers were able to pay their workers \$3.00 per hour less than what the local and state average wage for the occupation would have required, but many more examples exist and have been identified by advocates in DOL disclosure data.

As part of reforming the H-2B prevailing wage rule, President Biden can and should eliminate the use of employer-provided wage surveys, as his predecessor President Obama once proposed through a DOL regulation in 2011, but never implemented.<sup>118</sup>

### *H-2B visas should be allocated through a prioritization scheme rather than a random lottery*

In almost every fiscal year since the early 2000s, there have been more applications made by employers for H-2B workers than the number of available visas. USCIS deals with this by allocating H-2Bs to employers via a random lottery. Instead, USCIS should develop and implement a prioritization scheme for allocating H-2B visas. The best and likely easiest method would be to issue visas to employers offering to pay the highest salaries to their H-2B workers. USCIS could also consider other factors, for example by prioritizing visas for employers that are direct employers rather than labor contractors that use an outsourcing and fissured business model. In addition it could manage the cap by limiting the number of visas going to any single employer, which would benefit small businesses seeking to hire a small number of H-2B workers, rather than the large firms that employ hundreds of H-2B workers at a time.

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<sup>116</sup> Texas RioGrande Legal Aid, "[Louisiana Seafood Workers Sue to Invalidate U.S. Labor Rule That Allows Employers to Pay Rock-Bottom Wages](#)," Press Release, April 28, 2021.

<sup>117</sup> Daniel Costa, "[H-2B crabpickers are so important to the Maryland seafood industry that they get paid \\$3 less per hour than the state or local average wage](#)," *Working Economics* blog (Economic Policy Institute blog), May 26, 2017.

<sup>118</sup> See discussion in Daniel Costa and Ross Eisenbrey, "[EPI experts submit public comments supporting the Department of Labor's sweeping changes to H-2B guestworker program](#)," Economic Policy Institute, May 17, 2011.



## *DHS and DOL should create an affirmative process for workers to apply for and obtain prosecutorial discretion and work authorization when they are involved in labor disputes*

The H-2B's visa status which ties workers to a single employer and makes them vulnerable to employer retaliation necessitates the creation of an affirmative process for workers to apply for and obtain prosecutorial discretion and work authorization when they are involved in labor disputes with employers. At present, H-2B workers face too much risk when coming forward to avail themselves of federal agencies for protection when their employer breaks the law, and the current extensive backlogs and lengthy wait times for U visas for victims of crime make U visas an unrealistic option for many H-2B workers.

To remedy this, the Biden administration should provide clear written guidance on how workers can come forward to request status protection and work authorization and establish a mechanism for making such affirmative requests. DOL recently issued new guidance on how it can support immigrant workers and “provide workers experiencing a worksite labor dispute with guidance on how to seek the department’s support for their requests to the Department of Homeland Security for immigration-related prosecutorial discretion.”<sup>119</sup> While this is a welcome first step toward a process that encourages workers to come forward, the Department of Homeland Security should follow up quickly with a corresponding process that is straightforward and transparent and allows workers to obtain prosecutorial discretion and work authorization when they are involved in a labor dispute.

## *Regulations should improve job portability and provide a 90-day grace period for H-2B workers*

Because the H-2B program empowers employers to legally exert an unreasonable amount of control over migrant workers by virtue of controlling their visa status, H-2B workers are, in effect, captive workers. This means that if an H-2B worker isn't paid the promised wage or is forced to work in an unsafe workplace, the worker is unlikely to speak up or go to the authorities. Complaining can result in getting fired, which leads to becoming undocumented and possibly deported. It also means not being able to earn back the money that was invested to obtain the temporary job.

During the pandemic, both the Trump and Biden administrations introduced new regulatory provisions to permit a limited form of “portability” for H-2B workers to change employers or take on new jobs without having to leave the United States and obtain a new visa,<sup>120</sup> but the

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<sup>119</sup> U.S. Department of Labor, Office of the Solicitor, “[US Department of Labor posts process for seeking its support for immigration-related prosecutorial discretion during labor disputes](#),” Press Release, July 6, 2022.

<sup>120</sup> U.S. Department of Homeland Security, [Temporary Changes to Requirements Affecting H-2B Nonimmigrants Due to the COVID-19 National Emergency](#), Final Rule, 85 Fed. Reg. 28843 (May 14, 2020); Department of Homeland Security and Employment and Training Administration (U.S. Department of Labor), [Exercise of Time-Limited Authority to Increase the Fiscal Year 2022 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program and Portability Flexibility for H-2B Workers Seeking To Change Employers](#), Temporary Rule, 87 Fed. Reg. 4722 (January 28, 2022).

specifics of how this new portability operates has been criticized by worker advocates as mostly benefiting employers and falling short when it comes to protecting workers.<sup>121</sup>

The Biden administration should improve on this portability and make it more meaningful for employers by publishing information in real-time about available H-2B jobs, so that workers and advocates can easily find new opportunities that are available to H-2B workers who are presently in the United States. In order to provide enough time for H-2B workers to find new employment, especially in cases of abuses and lawbreaking perpetrated by employers, USCIS should allow H-2B workers to have a 90-day grace period on their visas. H-2B workers should also be allowed to access information about their own immigration status from USCIS, so that they are not forced to rely on their recruiters' and employers' promises about visa petitions and extensions.<sup>122</sup>

### *USCIS should allow H-4 spouses of H-2A and H-2B workers to be eligible for employment authorization*

As noted above in this testimony, many temporary work visa programs technically allow migrant workers to bring their spouses and children, including the H-2A and H-2B programs, where the spouses of H-2 workers are eligible for H-4 visas that allow them to accompany the primary H-2 beneficiary. However, H-4 spouses are not authorized to work, making it difficult, if not impossible, for spouses and children to accompany H-2 workers because of the high cost of living in the United States and low pay H-2 occupations. USCIS has the requisite legal authority to make all H-4 spouses eligible for employment authorization documents (EADs),<sup>123</sup> and should issue a regulation allowing H-4 spouses to apply for EADs. This will promote family unity. However, H-4 spouses should not be allowed to work for the same employer as the H-2 spouse, because, although H-4 visas are not tied to a single employer, an employer that employs both H-2 spouses would have an excessive level of control over the visa status of both spouses and whether they would be allowed to remain in the United States. Employers of H-2B workers could also use H-4 visas to circumvent the H-2B cap.

### *DOL should update the three-fourths guarantee for H-2B workers by requiring employers to guarantee 100% of the work hours on job contracts*

The current rule only requiring employers to pay for three-fourths of the work hours promised on job contracts is inadequate and unfair to H-2B workers recruited to the United States to work in low-wage jobs. H-2B workers should be able to count on the fact that employers will provide them with full time work and pay for 100% of the work hours

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<sup>121</sup> Migration that Works coalition, "[MTW's Recommendations to DHS Towards Ensuring Mobility for H2 Workers](#)," Statement, May 17, 2022.

<sup>122</sup> For more discussion, see the recent proposal on the ability of H-2A and H-2B workers to change jobs and employers from the Migration that Works coalition: "[MTW's Recommendations to DHS Towards Ensuring Mobility for H2 Workers](#)," May 17, 2022.

<sup>123</sup> See discussion in Daniel Costa, "[American Caesar? Not Even Close: The president has the statutory authority he needs to expand deferred action](#)," *Working Economics* blog (Economic Policy Institute), August 7, 2014.

promised on job contracts.<sup>124</sup> Otherwise, considering the very low wages in H-2B occupations, H-2B workers may not earn enough to justify coming to the United States to work, and they may be unable to calculate how much they are likely to earn while employed in the United States—despite often paying illegal recruitment fees to obtain H-2B jobs—which may also prevent them from making an informed decision about whether to migrate to the United States.

*DOL and DHS should provide H-2B workers with real-time access to data about their own immigration status, as well as on H-2B employers and recruiters*

H-2B workers are in a vulnerable situation if they are unable to access to information about their own immigration status and that of current or prospective employers. At present, employers control and have access to this information, leading to a power imbalance. DOL and DHS should thus make efforts to be much more transparent and make relevant information available quickly, if not immediately, and easily accessible to H-2B workers, including in a language that they can understand. DOL and DHS should also post information about any employers seeking to hire through the H-2B program, and which currently employ H-2B workers. Information posted should include, at a minimum, employer and recruiter names, job titles, worksite locations, wages and working conditions, and dates of need.

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<sup>124</sup> See further discussion in Daniel Costa and Ross Eisenbrey, “[EPI experts submit public comments supporting the Department of Labor’s sweeping changes to H-2B guestworker program](#),” Economic Policy Institute, May 17, 2011.